Supreme Court, U.S.

No. 06-1591

MAY 29 2007

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IN THE

United States Supreme Court

PERRY REICH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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May 29, 2007

QUESTIONS PRESENTED

1. The term "forgery" is commonly defined as fashioning or reproducing a document "for fraudulent purposes." Does 28U.S.C. § 505, the statute punishing forgery of federal judicial documents, require the Government to prove a specific intent to defraud, based on that definition, as consistently held by the Sixth Circuit since 1931, and implicitly recognized by the Seventh and Eleventh Circuits, or is intent to defraud not an element of the crime, as held by the Tenth Circuit and Second Circuit in this case?

2. The District of Columbia, Third, Fifth, Eighth and Eleventh Circuits, building upon *Michelson v United States*, 335 U.S. 469 (1948), have recognized that cross-examination of a character witness concerning specific instances of alleged misconduct is fraught with unfairness and potential for abuse. In these Circuits, inquiry is not permitted until the prosecutor establishes, prior to conducting cross-examination and in the absence of the jury, that there is a good faith basis for believing that (i) the incident occurred and (ii) is either a matter likely to be known in the community at large, for a "reputation witness," or otherwise likely to be personally known by the witness, for an opinion witness. In the Second Circuit, as held in this case and in a prior published opinion, cross-examination of character witnesses is a matter committed entirely to the broad discretion of the trial court and such knowledge need not be established.

(a) In this case, after the prosecutor posed the question, and objection was made by defense counsel, the district court permitted the prosecutor to inquire whether, if the character witness knew that petitioner had breached a pro-

vision in a partnership agreement, which required written permission to change beneficiaries, and petitioner had done so without such written permission, and designated the partnership instead of the partner's family as beneficiaries, that would change his opinion or the community opinion of petitioner. Oral permission had been given and petitioner never received any of the proceeds of the policy. The prosecutor was not required to establish community or personal knowledge. Is the Second Circuit procedure, which is at variance with other Circuits, interdicted by *Michelson* and the Federal Rules of Evidence?

(b) Over objection, the prosecutor was permitted to use a hypothetical question that assumed that the incident occurred and was a reflection of poor character and dishonesty. Does *Michelson* remain good law, in which event the question was improper, or are the district court and the Ninth Circuit correct in holding that *Michelson* has been superceded by the Federal Rules of Evidence?

3. Insofar as pertinent, 18 U.S.C. § 1512(c)(2), enacted as part of the Sarbanes-Oxley Act, punishes the obstruction of judicial proceedings. To sustain a conviction, must the Government prove that a defendant's conduct was intended to deceive the Court, and, if the prosecution is predicated on the discretionary acts of third parties, that the defendant's conduct had the "natural and probable" consequence of obstructing justice, by affecting the merits?

4. In a prosecution under 18 U.S.C. § 1001, based upon an F.B.I. agent's interview of the defendant at a proffer session, the indictment charged that the defendant made an affirmative falsehood, but the agent did not testify to any such specific inquiry. Rather, based on notes, not a transcript or tape recording, the agent testified that defendant

did not "admit" guilt. May the conviction be sustained on the theory that the jury could have inferred that defendant denied having sent the order, or, is the Ninth Circuit correct in holding that there be "clear evidence of what was said," with a specific question and specific answer?

5. Depending upon this Court's decisions in *Clairborne v United States*, Docket No. 06-5618, and *Rita v United States*, Docket No. 06-5754, currently *sub judice*, should the case be remitted for re-sentencing?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at *United States v Reich*, 479 F.3d 179 (2d Cir. 2007), and may be found in Appendix "A." The opinion of the district court is reported at 420 F.Supp.2d 75 (E.D.N.Y. 2006) and is attached hereto as Appendix "B."

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §1254. The Second Circuit issued its opinion on March 2, 2007, and no petition for rehearing was filed. Since this petition is being filed within 90 days of the entry of judgment of the Court of Appeals, it is timely.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Amdt. VI:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ."

18 U.S.C. § 505:

> "Seals of courts; signatures of judges or court officers. Whoever forges the signature of any judge . . . of any court of the United States . . . or knowingly concurs in using such forged or counterfeit signature . . . for the purpose of authenticating any proceeding or document . . . knowing such signature . . . to be false . . . shall be fined under this title or imprisonment not more than five years, or both."

18 U.S.C. § 1001(a)(2):

> "... [w]hoever, in any matter within the jurisdiction of the Government of the United States, knowingly and willfully ... makes any materially false, fictitious, or fraudulent statement or representation" has committed a crime.

18 U.S.C. §1512:

> "Tampering with a witness, victim or an informant
>
> (c) "Whoever corruptly—
>
> (2) otherwise obstructs, influences or impedes any official proceeding, or attempts to do so, shall be fined under this title or imprisoned not more than 20 years or both."

F.R. Evid. 405(a):

> "In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct."

STATEMENT OF THE CASE

A. Introduction

Defendant, PERRY REICH, a highly respected appellate attorney, stands convicted of obstruction of justice, under 18 U.S.C. § 1512(c) (Sarbanes-Oxley Act), forgery of a judge's signature, under 18 U.S.C. § 505, and false statements to law enforcement officers under 18 U.S.C. § 1001. The law firm of Joel Davidson ("Davidson") filed a law-

suit in the United States District Court for the Eastern District of New York, entitled *Ryan Beck & Co. v Fakih*, 268 F.Supp.2d 210 (E.D.N.Y.) *motion denied*, 273 F.Supp.2d 393 (E.D.N.Y. 2003), against Reich and others to stay arbitration of a securities claim before the National Association of Securities Dealers. The Magistrate Judge, to whom the case was assigned, originally denied a motion for a preliminary injunction, against the defendants and permitted the arbitrations to proceed pending the outcome of the civil suit. Davidson brought a motion for summary judgment. While that motion was pending, a bogus order appeared in which the Magistrate Judge purported to recuse herself and grant a preliminary injunction against all defendants, pending further proceedings before a different judge. The bogus order was the *corpus delicti* of the underlying crimes.

Prior to trial, a motion was made to suppress evidence, based upon the failure of the F.B.I. agent conducting the search to tender a copy of the search warrant, as required by F.R. Crim. P. 41 (Tr. 623). Insofar as pertinent, the search uncovered a manual for an ancient fax machine, a Canon Faxphone 8. In addition, the hard drives on the defendant's home and office computers were copied. The agent executing the warrant contended that he also found a fax machine in the basement, which the warrant directed be seized, but he "forgot" to take it (Tr. 621). The motion to suppress was denied.

In addition, a motion *in limine* was made, predicated on the Government's failure to obtain the original purported fax that Davidson claimed he had received. Following a hearing, that motion was also denied, and the Government was permitted to use "copies."

Finally, a pre-trial *Daubert* hearing was conducted to determine the reliability of an out-of-court experiment conducted by a Government expert. Following the hearing, the Court held that evidence concerning the out-of-court experiment would be received.

At trial, the Government relied upon telephone records showing that a telephone at defendant's home had connected to a fax machine at Davidson's office, expert testimony, based on an out-of-court experiment, *purporting* to establish (1) that the Davidson facsimile would "time-out" after a specified interval, and (2) that the differences in the number of pages listed as received on the Davidson fax log, (two pages as opposed to the four sheets comprising the cover page and bogus order), could be explained if all of the pages had been faxed from a stand alone fax machine in a single continuous sheet, namely "tractor paper."

Defendant, who took the stand in his own defense, and denied sending the fax, presented expert testimony as well. The defense expert noted—and the Government witness agreed—that there was no evidence of the bogus order on any of the hard drives cloned from defendant's computers, and that there would be traces of it had the document been erased. Similarly, there was no evidence of a fax on any of defendant's computers, which would have been the case had it been faxed through the fax motion on the computer, albeit it would be impossible to fax "tractor paper" through a fax modem. In addition, the F.B.I. never obtained the purported original fax. The defense expert believed that the document never was a fax, but was always a photocopy.

B. The Trial Testimony

1. The Government's Case

Telephone records showed that a telephone call from Reich's home had connected to the Davidson fax machine at approximately 11:08 a.m. on June 17, 2003, and that the call lasted some three minutes (Tr. 296, 303-304, 323). Davidson's secretary did not notice any fax arrive because she was out of her office, and first noticed it "on the machine" when she returned (Tr. 103, 120, 129, 132-133). On the date that the fax was purportedly received, she had no idea of the time that she noticed it; she could only say that it arrived sometime that morning (Tr. 134).

The secretary's belief that the fax arrived at either 11:08 a.m. or 11:27 a.m., was based upon two entries in the fax log that did not contain the telephone numbers of the sender (Tr. 120, 125-127). Initially, the secretary thought that the 11:27 a.m. listing involved the bogus fax, but subsequent events led her to change her mind (Tr. 152). In the end, the secretary did not know whether the document was actually faxed or whether it was a photocopy left at her machine (Tr. 154).

A firm associate received the document from the firm secretary (Tr. 273). The associate could not fix a particular time of receipt, putting it at sometime between 11:00 - 11:30 a.m. and even as late as 12:00 p.m. noon, based on the time that she faxed the document to Mr. Davidson at home (Tr. 248).

The document consisted of four pages (GA 01-04). One page was the "cover sheet" (GA 01). The other three pages constituted the bogus order (GA 02-04). The entry on the

fax log at the Davidson firm for the 11:08 a.m. call indicated that *two* pages were received (Govt. Ex. "2").

The bogus order purported to grant a preliminary injunction against certain defendants and to, *sua sponte*, recuse the Magistrate Judge and refer the matter back to Chief Judge Korman (Tr. 183, 238, 348-49, 357).

In the interim, Davidson had made a motion for summary judgment. When the Magistrate Judge had not decided the matter according to Davidson's time table, Davidson filed a petition for a writ of mandamus in the Court of Appeals against the Magistrate Judge.

Upon receipt of the bogus order, Davidson instructed his assistant to send it to attorneys representing his client in other litigation (Tr. 192, 193, 360). He also dictated letters to arbitration panels, to the Court of Appeals, to Judge Korman and to other attorneys (Tr. 360, 361).

The next day, June 18, 2003, one of the attorneys for the defendants in the civil litigation called the Magistrate Judge to determine whether a decision had, in fact, been issued (Tr. 530, 536). The Magistrate Judge's law clerk asked that the bogus order be faxed to chambers (Tr. 530). Upon receipt, the Magistrate Judge contacted Judge Korman, the United States Attorney, and the Court of Appeals (Tr. 534). She also issued an order, dated June 18, 2003, stating that the earlier document was false (Tr. 535).

After learning that the order was bogus, the Davidson firm asked Federal Express not to deliver the packages or informed the intended recipients not to accept them (Tr. 219, 220, 363). Davidson also sent letters to Judge Korman, the Magistrate Judge, and the Court of Appeals (Tr. 275, 277, 363, 364, 365).

The bogus order *never* became part of any court record and was not mentioned in the Magistrate Judge's subsequent decision in the case (Tr. 557-560). *See, Ryan Beck & Co. v. Fakih*, 268 F.Supp2d 210 (E.D.N.Y.) *motion denied*, 273 F. Supp.2d 393 (E.D.N.Y.). In fact, when initially interviewed by the F.B.I., the Magistrate Judge's law clerk suggested that it might have been a "joke" (Tr. 563).

The Government conceded that the bogus order was not an original fax, and offered no explanation as to what happened to that original fax (Tr. 628-29, 630, 636-37) The copies that it offered differed in material respects. Some had an "extended page 2.1" on it; others did not. A copy of the document that was allegedly received by Davidson at his home, which he first gave to the Government a month before trial (Tr. 634), had an "extended page 2.2" on it (Tr. 634-35). The Government speculated that the differences could have been caused by errors in photocopying, but there was no testimony concerning photocopying, other than a copy given to F.B.I. Agent Wilfling when he came to the Davidson office in June, 2003 (Tr. 156, 168, 211, 235, 267, 285, 570).

According to the Government expert, the three minute telephone call was consistent with a fax transmission since the type of fax machine in the Davidson office would terminate the connection if a fax signal was not received within approximately 41 seconds (Tr. 406, 454-55). The expert was of the opinion that the fax log indication of two pages, as opposed to four pages, and the "extended page" notation on two of the copies, was the result of the Davidson machine reading the last two pages as one long page (Tr. 463). He used tractor paper to conduct the experiment, though he later conceded on cross-examination that it

would take special equipment to reproduce the bogus order on tractor paper (Tr. 460-468, 490-91), that there was no evidence that the pages overlapped (Tr. 488-89), and that if the pages were taped together, it would probably jam the machine (Tr. 489).

2. The Defense Case and Character Testimony

The defense expert testified that his examination of the computer images seized by the F.B.I. showed that the bogus order was not created on any of the defendant's computers, as the F.B.I. expert conceded (Tr. 723-24, 729-31), and it could not be sent through the defendant's computer fax modem (Tr. 997-99). He noted that it was difficult, if not impossible, to activate the "extended page" function on the Davidson machine, as each time he tried this experiment with taped pages, his machine jammed (Tr. 1000-01). Further, the "extended page function" could not be triggered by a facsimile transmission sent by a fax modem and a flatbed scanner (Tr. 1002-03).

Although, in its post-trial opinion the district court found the defense expert wanting because he did not use a Faxphone 8 in his experiment, *see, United States v Reich*, 420 F.Supp.2d 75, 86 (E.D.N.Y. 2006), neither did the Government expert (Tr. 491). To the extent that the district court criticized the defense expert's failure to use tractor paper, the Government expert admitted that special equipment was necessary to copy the bogus order on tractor paper, that defendant was not likely to have such special equipment, that there was no evidence of overlap, and that if taped together, the machine would jam (Tr. 488-491).

The expert also challenged the authenticity of the "copies" of the bogus order, explaining why the document was not

originally sent as a facsimile transmission (Tr. 1623-27). Using a power-point presentation, he showed that the degraded quality of the letters on different pages demonstrated that each of the pages was from a different generation, something that would not happen in normal photocopying (Tr. 1023-27).

Defendant took the stand in his own defense, explaining that his computer fax modem sometimes engaged his telephone line and causes the line to remain connected after the call has ended (Tr. 887-88). The defense expert, to a reasonable degree of scientific certainty, was of the opinion that, when defendant hung-up, the fax modem on defendant's computer "latched" on to the Davidson fax, and continued to "hand-shake" until the Davidson machine disconnected, thereby leaving defendant's line still open (Tr. 1037-38, 1176-77, 1196). The Government expert conceded that, if this had taken place, it would have taken more than 41 seconds for the Davidson machine to disconnect (Tr. 480). The fact that the receiving machine "timed out" after three minutes and 18 seconds, and the telephone records indicate that defendant remained connection for four minutes 25 seconds, could not be explained in any other way (Tr. 1039, 1180).

James Pelzer, the Clerk of the Appellate Division of the Supreme Court, Second Judicial Department, an intermediate New York Appellate Court, testified to defendant's good character (Tr. 812-815). Pelzer knew defendant since the early 1980's, when defendant served as a law clerk to then Associate Justice Vito J. Titone, and stayed with Judge Titone upon his elevation to the New York Court of Appeals (Tr. 811-12, 814). He also knew defendant when he was a law clerk to Judge Jacob Fuchsberg, also of the

New York Court of Appeals (Tr. 812, 814). Pelzer explained that defendant was "a person of high honesty and integrity, a person you can trust, and you can trust his word. I think that in talking of Perry [Reich] with others, others share that same opinion" (Tr. 813, 815).

Without first seeking a ruling from the court outside the presence of the jury, the Government sought to attack defendant's character by asking about an allegedly unauthorized change in a partnership life insurance policy (Tr. 817). In the jury's presence, and before establishing the *bona fides* of the inquiry, the prosecutor asked Mr. Pelzer whether his opinion would change "if you learned about Mr. Reich changing the beneficiaries of an insurance policy of Mr. Schapiro?" (Tr. 817). An objection was sustained, but the prosecutor protested, "I think it is an appropriate question" (Tr. 817). Discussion was had outside the presence of the jury, and the objection was overruled (Tr. 817). Upon protest by defense counsel, further argument was entertained.

Prior to the question, Pelzer indicated that he had no knowledge of any partnership or insurance agreements, but knew that Mr. Schapiro was deceased (Tr. 817, 818). The jury later heard that Schapiro had died of cancer. When defendant testified in his own defense, he explained that he had notified Schapiro before changing the policy beneficiary, and that he had done so to protect the firm with regard to money loaned by Schapiro's mother to Schapiro, for which the firm was responsible (Tr. 866-75). There was no dispute that defendant never received any of the proceeds of the life insurance policy, as Mr. Schapiro changed the beneficiaries to his mother and girlfriend when the policy

was assigned to him following dissolution of the partnership (Tr. 868, 953-54).

The district court declined to conduct any hearing concerning the prosecutor's good faith (Tr. 834), and upon balancing prejudice against probative value, concluded that the question went "to the heart of the government's case," given Mr. Pelzer's stature in the legal community (Tr. 841). No limiting instruction was given and challenge to the form of the question was rejected (Tr. 836-37, 846 ["Let's forget about the form."]). It should be noted that, contrary to footnote 2 in the opinion of the Court of Appeals, challenge to the form of the question *was* raised on appeal, after the panel hearing argument on an application for bail pending appeal indicated that it thought that the form of the question violated *Michelson v United States*, 335 U.S. 469, 482 (1948) (in cross-examining character witnesses "the form of inquiry, 'Have you heard?' has general approval, and 'Do you know?' is not allowed"). *See*, Government Appellee's Brief in Court of Appeals, p. 24, n. 5; Appellate Reply Brief in Court of Appeals, p. 15, n. 3.

3. Government Rebuttal

A manual to a Canon Fax Phone 8 was found during a search of defendant's home. The machine was over 20 years old and defendant testified that he had discarded it in 2000, because he was not able to connect to the newer machines, and instead used his flatbed scanner and fax modem (Tr. 891-93, 948-49). F.B.I. Agent Richard Wilfling, who obtained the search warrant that specifically sought seizure of a fax machine at defendant's residence (Tr. 583-84), claimed that he saw a fax machine at the house, but "forgot" to seize it (Tr. 621).

An employee of Canon, who had never seen or used a Canon Fax Phone 8, contended that the bogus order could have been sent from such a device, because the Fax Phone 8 did not transmit a "header," but later conceded that a "footer" on the document upside down would be a header (Tr. 1215-19).

C. Verdict, Post-Trial Motions and Sentencing

All three counts of the indictment were submitted to the jury. Counsel objected to the instructions. With respect to the forgery count (18 U.S.C. § 505), he contended that it was error to decline to change "intent to defraud" (Tr. 1445). Counsel also contended that the court improperly permitted the jury to consider an "attempt" to obstruct justice, because the indictment alleged a completed crime and the case was tried on that basis (Tr. 1248-52, 1340-41).

Following a verdict convicting him of all three counts, defendant made a motion for a judgment of acquittal, a new trial, and other relief. Some of these claims were withdrawn upon retaining new counsel (Tr. 1454-1468).

The district court denied the post-trial motions and bail pending appeal in a published opinion. *United States v Reich*, 420 F.Supp.2d 75 (E.D.N.Y. 2006). It found that defendant was not a flight risk, but held that there was sufficient evidence to support all three counts, and that none of its rulings, including the three set forth in this petition, presented substantial grounds for appeal.

Although the court acknowledged that *United States v Monteleone*, 77 F.3d 1086 (8th Cir. 1996) had held that impeachment of a reputation witness could not be undertaken if the matter at issue were private, he believed that

the Second Circuit would not follow it, and that the matter was not private, because Schapiro's family and attorneys knew about it.

The pre-sentence report calculated defendant's combined adjusted offense level at 18, which included a two point enhancement for abuse of a special skill (U.S.S.G. § 3B1.3) and a two point enhancement for obstruction of justice (U.S.S.G. § 3C1.1), due to his testimony at trial. The court found a guidelines sentence to be reasonable, and imposed a sentence of 27 months imprisonment, a fine, restitution, and supervised release, after hearing the Government's argument that the defendant's purportedly unauthorized change of the life insurance policy was a strong factor to consider in imposing sentence (S:35).

D. Proceedings in the Court of Appeals

Defendant renewed his application for bail pending appeal before the Court of Appeals. The matter was set for oral argument at which the motions panel advised both counsel that it had problems with the form of the question. Nonetheless, the panel denied the motion.

On March 2, 2007, the Court of Appeals affirmed the judgment in all respects in a published opinion. *United States v Reich*, 479 F.3d 179 (2dCir. 2007). On the issues relevant here, it concluded that there was sufficient evidence to support the conviction; that it would follow the decision of the Tenth Circuit, rather than that of the Sixth, Seventh and Eleventh Circuits, and hold that intent to defraud was not an element of 18 U.S.C. § 505; that the character impeachment was appropriate, there being no need for the prosecutor to show that the matter was known in the community or that the witness would otherwise be

expected to know about it; and that no error occurred in sentencing.

REASONS FOR GRANTING THE WRIT

A. Introduction

Each of the three issues tendered concern issues of substantial public importance that have divided the circuits. Each present the issues in a fully developed factual background, free of any procedural short comings. In addition, the Court of Appeals did not find any error to be harmless. Hence this case is an excellent vehicle to resolve these conflicts.

B. The Circuits are Divided on the Question whether Fraudulent Intent is a Required Element of Forgery Under 18 U.S.C. § 505: The Better View is that a Conviction Cannot Stand Unless the Government Proves Fraudulent Intent Beyond A Reasonable Doubt.

In *Levinson v United States*, 47 F.2d 470, 471 (6th Cir. 1931), the United States Court of Appeals for the Sixth Circuit squarely held that the forerunner of 18 U.S.C. § 505 required proof of an intent to defraud. The decision rests upon the plain meaning of the word "forgery."

As commonly understood English, "forgery" means ". . . the crime of falsely and fraudulently making or altering a writing or other instrument that if genuine might apparently be of legal effect on the rights of another." Webster's Third New International Unabridged Dictionary, p. 891. It is ". . . the making of a false writing with intent to defraud." Britannica Concise Encyclopedia, p. 679; *see also*, Black's Law Dictionary, p. 677 (8th ed. 2004).

The Sixth Circuit adhered to the *Levinson* holding in *United States v Bertrand*, 596 F.2d 150, 152 (6th Cir. 1979), *cert. denied*, 450 U.S. 1004 (1981), and *Levinson*, has been cited with approval on this point by the Seventh Circuit, *United States v Dyer*, 546 F.2d 1313, 1316 (7th Cir. 1976), and the Eleventh Circuit, *United States v London*, 714 F.2d 1558, 1563-64 (11th Cir. 1983). Although the Second Circuit in this case said that the point was not actually resolved in *Dyer* or *London*, the Tenth Circuit viewed it as ". . . accepted in other circuits that this forgery statute necessarily includes the element of intent to defraud." *United States v Barber*, 39 F.3d 285, 287 (10th Cir. 1994).

Indeed, while the language in *Dyer* may be dictum, its analysis of the statutory language is very persuasive. That Court dissected the statutory provisions and based on plain English believed that it required an intent to defraud.

In rejecting these authorities, the Tenth Circuit in *United States v Cowan*, 116 F.3d 1360, 1361 (10th Cir. 1997), searched for an ambiguity that does not otherwise exist, noting that some forgery statutes contained the terms "intent to defraud," but others, did not. Since the original enactments were not simultaneous, it is difficult to perceive what this establishes. All it can mean is that sometimes a drafter used a redundancy.

Ignoring the plain meaning of the word "forgery," the Tenth Circuit concluded, as did the Second Circuit here, that, in its view, § 505 is designed to "protect[] the integrity of a government function—namely federal judicial proceedings."

Even if that be so, it does not follow that an intent to defraud is not an element of forgery. Indeed, the Tenth Circuit construction leads to absurdities. For example, a party

invitation, "ordering" someone to appear at a specific location for the party, a holiday card "ordering" someone to have a happy holiday, or an April Fool's prank, could be prosecuted, if the "order" looked like it was genuine.

McNally v United States, 483 U.S. 350, 358 (1987), which the Second Circuit relied upon for its "historical view" of what is meant by "defraud" is totally inapposite. *McNally* held that a prior version of the Federal Mail Fraud statute was limited in scope to the protection of property rights and did not refer to the intangible right of the citizenry to have public officials perform their duties honestly. The statute has since been amended to overturn that holding. But the nub of the matter is that *McNally* did not construe a forgery statute.

In the context of a prosecution under § 505, the Tenth Circuit previously said, "A common sense and common definition of fraudulent intent demands the perpetrator act for personal benefit or to deprive the other person of something, that something need not be money." *Barber*, 39 F.3d at 288; *see also*, *O'Malley, Grenig & Lee*, Federal Jury Practice and Instructions, Criminal § 32.11 (West 2001), citing *United States v Snow*, 670 F.2d 749, 753 (7th Cir. 1982) (where a similar instruction was given).

Although neither the Second nor the Tenth Circuit Court found any "elucidating legislative history" for § 505, this ignores the fact that what was the forerunner of § 505 was re-enacted in identical form in 1948. *See*, Pub. L. No. 80-772, 62 Stat. 683. Its construction by the Sixth Circuit in 1931, 17 years earlier, was undoubtedly known to Congress. Pursuant to the legislative re-enactment doctrine, Congress is "presumed to be aware of [a] . . . judicial interpretation of a statute and to adopt that interpretation when

it re-enacts a statute without change." *Lorillard v Pons*, 434 U.S. 575, 580 (1978). Consequently, it is more likely that Congress intended to maintain the construction of § 505 previously adopted by the *Levinson* Court.

In sum, we have a split in the various circuits concerning the elements of a Federal crime. This case presents the opportunity to resolve that conflict.

C. The Circuits are divided on the impact that F.R. Evid. 405 has on this court's decision in *Michelson v United States*, 335 U.S. 469 (1948) and the scope of Permitted Cross-Examination of character witnesses: the Better View requires a Prosecutor to seek a ruling outside the Jury's presence and demonstrate a Good Faith factual basis for the incidents sought to be raised in Cross-Examination and that the events are of a type likely to have become a matter of general knowledge in one community or otherwise known to the witness.

Almost 60 years have elapsed since this court decided *Michelson v United States*, 335 U.S. 469 (1948), the seminal authority on the reception of character evidence. The Federal Rules of Evidence have somewhat liberalized the scope of character evidence, by permitting a character witness to give his or her own personal opinion of character traits in addition to pure reputation evidence.

This case represents the opportunity to resolve a conflict in the various courts concerning the scope of permissible cross-examination of character witnesses and the condition precedent to its reception, and to either reaffirm *Michelson* or modify it, as some circuits have suggested. *See, e.g. United States v Scholl*, 166 F.3d 964, 974 (9th Cir. 1999).

The decision of the Second Circuit below, as well as its prior precedents, *see, e.g. United States v Birney*, 686 F.2d 102, 108 (2d Cir. 1982), relegate the reception to character evidence and cross-examination of character witnesses to the almost unbridled discretion of the trial court. In contrast, the District of Columbia, Third, Fifth, Eighth, and Eleventh Circuits, drawing from *Michelson*, have imposed substantial procedure safeguards, deeming them required by *Michaelson* and the Federal Rules of Evidence. *See, e.g., United States v Lewis*, 482 F.2d 632, 639 (D.C. Cir.1973); *United States v Curtis*, 644 F.2d 263, 268 (3d Cir. 1981); *United States v Duke*, 492 F.2d 693, 696 (5th Cir. 1974); *United States v Monteleone*, 77 F. 3d 1086, 1089 (8th Cir. 1996); *United States v Adair*, 951 F.2d 316, 319 (11th Cir.). As the *Monteleone* court cautioned, ". . . [t]he process 'is fraught with great danger' unless circumscribed by rules of fairness grounded in demonstrated good faith on the part of the prosecution. The result could be most prejudicial to the defendant and make for a miscarriage of justice." *Monteleone*, 77 F. 3d at 1089, quoting *Gross v United States*, 394 F. 2d 216, 219 (8th Cir. 1968) and *United States v Krapp*, 815 F. 2d 1183, 1186 (8th Cir.), cert. denied 484 U.S. 860 (1987).

These courts require the prosecutor to seek a ruling outside the jury's presence *before* inquiry is made, and demonstrate both a good faith factual basis for the incidents sought to be raised during cross-examination, and that the incidents inquired about are relevant to the character traits at issue. *See Monteleone*, 77 F. 3d at 1090; *Curtis*, 644 F. 2d at 268; *Adair*, 951 F. 2d at 319. Recognizing that F.R. Evid. 405(a) permits cross-examination into "relevant specific instances of conduct," to test the reliability and credibility of the character witness, not to prove that a

defendant committed any particular bad acts, these courts hold that a prosecutor must establish *more* than a good faith belief that the incidents actually occurred. *Monteleone*, 77 F 3d at 1090; *Curtis,* 644 F. 2d at 268; *Adair*, 951 F. 2d at 319.

For a pure reputation witness, "The prosecutor must possess a good faith belief that the described events are of a type 'likely to have become of general knowledge, currency or reputation in the community.'" *Monteleone*, 77 F. 3d at 1090, quoting *Duke*, 492 F.2d at 696, and citing *Michelson*, 355 U.S. at 469; *see Curtis*, 644 F.2d at 269. The good faith showing for an opinion witness is slightly more nuanced. "[A]n opinion witness can be cross-examined only on matters bearing on his own opinion . . . ," so the ". . . relevant cross-examination is only that which bears on the fact or factual basis for the formulation of that opinion." *Curtis,* 644 F. 2d at 269, 268. In other words, the depth of community knowledge is irrelevant, and admission depends on whether the incident is something that is "easily verified" and would logically impact the opinion. *See, United States v Bruguie*, 161 F 3d 1145, 1149 (8th Cir. 1998); *cf. United States v Scholl*, 166 F.3d at 974 (cross-examination of opinion character witness proper, where based upon public charges of judicial incompetence against the defendant-judge.)

In *Bruguie*, three pure opinion witnesses testified that the defendant was a "good father." On cross-examination, they were asked whether they had considered a child abuse finding made by a governmental agency in formulating their opinions. Noting that the child abuse finding was "easily verified," 161 F. 3d at 1149, the court found the questioning permissible: "If . . . a finding of child neglect

had been made with respect to the [the defendant], and if the witnesses knew that, any grounds for believing that [defendant] was a good father would be undermined. And if, on the other hand, the witnesses were not aware of such a finding, the jury might believe that their acquaintance with the defendant was not enough to justify their opinion." 161 F. 3d at 1149.

The Eighth Circuit found the procedure employed by the prosecutor and the district court deficient, because the prosecutor made no request for a ruling outside the jury's presence before he conducted cross-examination, but affirmed because defense counsel failed to make proper objection or seek a mistrial after the questions were posed. 161 F.3d at 1149-1150.

The Second Circuit's statement that *Bruguie* somehow stands for the proposition that a prosecutor need not demonstrate that an opinion witness should have been aware of the "specific incident" before cross-examination, is plainly incorrect. If there is no reason to expect the witness to know about the incident, then the question cannot possibly be said to test the witness's credibility, and the inquiry is simply irrelevant.

Where the incident at issue is purely private, not likely to be known in the community or otherwise known to the witness personally, with the exception of the Second Circuit, all Circuits that have considered the question have held such conduct irrelevant and not a proper subject for cross-examination. *See*, 22 Wright & Graham, Federal Practice & Procedure, § 5268, at 620 (1978); *cf. United States v Birney*, 686 F. 2d 102, 108 (2d Cir. 1982) (Upholding cross-examination of clergyman as to whether certain nondisclosures by the defendant in certain loan applica-

tions would effect the witness's opinion of the defendant's character; case criticized in Wright & Graham as involving private matter not likely to be known by the witness).

The Second Circuit viewpoint, as set forth in *Birney* and the opinion below, that the entire scope of such cross-examination is committed to the trial court's discretion, and that it matters not whether the incident is "private" and therefore unlikely to be known in the community or to the witness, is plainly at odds with these principles. Simply calling a matter discretionary does not immunize it from judicial review. *See, Koon v United States*, 518 U.S. 81, 100 (1996). "A district court, by definition, abuses its discretion when it makes an error of law." *Ibid.*

The form of the question, a hypothetical assuming that the incident actually occurred, is similarly problematical. Contrary to footnote 2 in the opinion of the Court of Appeals, challenge to the form of the question *was* raised in the district court (Tr.836-37,846) and in the Court of Appeals after the motion panel indicated that it was an issue. (*See,* Appellee's Brief in Court of Appeals, p. 24, n.5; Appellant's Reply Brief in Court of Appeals, p.15, n.3).

According to *Michelson*, 335 U.S. at 482, in cross-examining character witnesses, "The form of inquiry, 'Have you heard?' has general approval, and 'Do you know?' is not allowed." The reason, of course, is that the question is designed to test credibility, not to suggest that the event actually occurred. Nonetheless, the Ninth Circuit has concluded that this aspect of *Michelson* did not survive the adoption of the Federal Rules of Evidence. *See, United States v Scholl*, 166 F.3d at 974.

The use of the guilt assuming hypothetical, moreover, amounted to a denial of confrontation. U.S. Court, Admt.VI; *see, Crawford v Washington*, 541 U.S. 36 (2004). Defendant was not given the opportunity to refute the out of court allegations of the Schapiro family, and the prosecution was given the opportunity to argue that the innuendo was substantive proof. As the prosecution argued in rebuttal summation, "I submit to you that the defendant's actions on the witness stand were staged. You heard him testify about his dog dying from cancer and didn't cry when his partner died from cancer when he talked about that." (Tr. 1374). In addition, the prosecutor argued that the incidents should be considered in sentencing. (S.35)

No limiting instruction was given. It has been almost universally held outside of the Second Circuit, however, that limiting instructions are ineffective to dispel the prejudice. *See, Monteleone*, 77 F.3d at 1091, quoting *Awkard v United States*, 352 F.2d 641, 645-46 (D.C. Cir. 1965).

This case presents a perfect fact pattern to resolve the conflict in the Circuits. The question was posed to Pelzer in the presence of the jury *before* the court required the prosecutor to set forth a basis for the inquiry. Even then, at no time did the prosecutor offer any theory for a good faith belief that the matter was known to the community or otherwise known by the witness. Therefore, the suggestion by the district court and the Court of Appeals that there was some sort of basis for community knowledge, because no one was sworn to secrecy, lacks any support in the record.

More important, the content of a partnership agreement is clearly a private matter. Absent litigation, when the document would become public, its contents are hardly a matter that the community, let alone an appellate court clerk,

would know. That the parties and their families may know about it does not change the equation. *Monteleone,* which the Second Circuit indicated it would not be inclined to follow, did not state a rule limited to grand jury testimony, and cannot be squared with the decision below.

Finally, it might not be amiss to note that there was even a serious question as to whether there was any contract breach. Because the agreement did not contain a clause against oral modification or waiver, the conduct of the parties could establish an oral modification or waiver. *See, e.g., United States v Merritt Meridan Constr. Corp.*, 95 F.2d 153, 165 (2d Cir. 1996) *affg.* 890 F.Supp. 1213 (S.D.N.Y. 1995); *Arrow Plumbing Co. v Dare Constr. Corp.*, 212 N.Y.S.2d 438, 441 (1961); 13 Williston on Contracts, § 39:36 (4th ed.). Since it is undisputed that defendant did not receive any of the proceeds of the policy, and that the change was made to induce Schapiro's mother to loan him money, there was no probative value or basis for the inquiry. Hence, it should not have been received pursuant to F.R. Evid. 403, as well.

D. Deception of a Court and a Tendency to Affect the Merits are Required Elements of 18 U.S.C. § 1512(c)(2)

The indictment charged a *completed* crime of obstruction of justice, in violation of 18 U.S.C. § 1512(c)(2), part of the Sarbanes-Oxley Act. *See*, Pub.L. No. 107-204, 116 Stat. 745 (2002). And defense counsel protested the effort to change the theory to an "attempt" at trial, after the Government declined to call the Magistrate Judge's law clerk and the Court refused to allow questioning as to whether justice was actually obstructed (Tr. 1248-52, 1340-41).

Although there is a great deal of legislative history for the Act, there is scant discussion of what eventually became 18 U.S.C. § 1512(c)(2), and this appears to be one of the first prosecutions under it. Because of the overlap with 18 U.S.C. § 1503, *see*, Roadcap, *Obstruction of Justice*, 41 Am. Crim. L. Rev. 911, 937 (2004), because of the reluctance of most courts to apply § 1503 to civil litigation, *see, e.g., Richmark Corp. v Timber Falling Consultants,* 730 F.Supp. 1525, 1532 (D.Ore. 1990) (civil defendant's counterclaim did not allege the predicate offense of obstructing justice under § 1503, as there were extensive remedies available in civil suits); *contra, United States v Lundwall*, 1 F.Supp.2d 249, 254-55 (S.D.N.Y. 1998), and because the literal language of § 1512(c)(2) could turn every potential Rule 11 violation into a criminal prosecution, this case is an excellent vehicle in which to define and refine its scope.

According to commentators, § 1512(c), which appears in the context of a statute that concerns witness tampering, was meant to cover instances in which a person *destroys or creates evidence* with the intent to affect the merits of an investigation or judicial proceeding. *See*, Anchincloss & Walsh, *Obstruction of Justice*, 42 Am. Crim.L.Rev. 721, 746-47 (2005); B. Vango, S. Kagen, & J. Classen, *The Sarbanes-Oxley Act of 2002: A Securities Litigation Perspective*, 132 PLI/Corp. 89, 111-12 (Practicing Law Institute, Sept.-Oct., 2002); *see also*, Note, *Anticipating Obstruction of Justice: Preemptive Document Destruction Under the Sarbanes-Oxley Anti-Shredding Statute*, 89 Corn. L. Rev. 1519 (2004); Note, *Evidence Tampering*, 53 Duke L.J. 1215 (2004). As one court has explained: "Section 1512(c) was one of the measured responses by Congress to improve the accuracy and reliability of corporate disclo-

sures by penalizing those who obstruct justice by somehow impairing the integrity or availability of records, documents and other tangible objects." *United States v Hutcherson*, __ F.Supp.2d __, 2006 WL 270019, *2 (W.D.Va.).

Although the decisions applying § 1503 are useful in assessing whether a particular course of conduct constitutes obstruction under § 1512(c)(2), the two provisions are strikingly dissimilar. Specifically, the "omnibus clause" of § 1503, which contemplates actions affecting the "due administration of justice" has no counterpart in § 1512(c)(2), which only contemplates actions affecting "any official proceeding." Thus, the reach of § 1512(c)(2) is necessarily more narrow than § 1503.

Even in the context of § 1503, "The act of altering or fabricating documents used or to be used in a judicial proceedings would fall within the obstruction of justice statute, *if the intent is to deceive the Court. United States v Craft*, 105 F.3d 1123, 1128 (6th Cir. 1997) (affirming dismissal of indictment on statute of limitations grounds). (Emphasis added).

In this case, the proof is clear. The bogus document was not filed in any court, and there is absolutely no evidence of any attempt to deceive any court. That was not the theory of the Government case and the jury was never instructed on such a theory. For that reason, the Court of Appeals made no mention of the issue, even though the district court found that question to be "substantial." 420 F.Supp.2d at 88 n.4. The district court's claim that the jury could have found that the Davidson firm was made an *"unwitting agent" of the defendant in connection with the mandamus proceeding, is belied by the lack of an instruction to the jury on such a theory and the lack of any basis*

in the evidence for it. The bogus order was never filed with the Second Circuit, and there was no dispute that the bogus order was void and unenforceable, and had no impact on the decisions of the Magistrate Judge.

Even if the purported deception would have induced the Davidson firm to withdraw the mandamus petition—and there was a decision by the Second Circuit denying the petition *on the merits*—it would not have had any impact on the litigation in the district court. As this Court has long recognized, mandamus is an extraordinary remedy, for extraordinary cases, and such writs are rarely granted. *See, e.g., Mallard v United States Dist. Court*, 490 U.S. 296, 309 (1989); *Allied Chem. v Daiflon*, 449 U.S. 33,34-35 (1980); *Will v United States*, 389 U.S. 90, 98 (1967). There is no case that has ever held that a judge may be compelled through mandamus to decide a motion on a timetable fixed by one of the litigants. Even if there were, the grant or denial of mandamus could not "affect" the Ryan Beck lawsuit in the district court. The motion would still have to be decided.

In fact, when the motion was decided, summary judgment was *denied. Ryan Beck & Co. v Fakih*, 268 F.Supp.2d 210 (E.D.N.Y.) *motion denied*, 273 F.Supp.2d 393 (E.D.N.Y.2003). The District Court held that there were questions of fact concerning the "asset sale" because it was a "sale" with no consideration and the name Gruntal survived.

From the opening and closing statements, it appears to be the Government position that, if anyone was "inconvenienced" in some manner, a violation of § 1512(c)(2) was established. This cannot be the law, because it would turn any Rule 11 sanction into a *de facto* crime. Distribution of

the bogus order to colleagues was an act done by Davidson himself and inconvenience or embarrassment does not constitute obstruction.

Although this Court does not grant certiorari to review facts, it should be noted that under the tests of *Arthur Anderson, LLP v United States*, 544 U.S. 696, 705-07 (2005) and *United States v Aguilar*, 515 U.S. 593, 599 (1995), which, if applicable to § 1512(c), would require a finding that the defendant's conduct had the "natural and probable effect" of interfering with the proceeding—here the *Ryan, Beck* lawsuit in the District Court—the conviction could not stand. The faxing of an unenforceable document could not "influence", i.e. have an affect on the merits, *see*, Webster's Third New International Dictionary, p. 1190, of the proceeding itself. Calling chambers, recalling letters, and the like simply has nothing to do with the *merits* of the proceeding. If it did, every discovery dispute could turn into a criminal prosecution. Section 1512(c) was not meant to have such an effect.

E. Absent "Clear Evidence of What was Said" a Conviction Under 18 U.S.C. § 1001 Cannot Stand.

The indictment in this case charged defendant with having made a "materially false, fictitious, and fraudulent statement . . . [to] the F.B.I., in that defendant falsely *stated* and represented that the Forged Order was not faxed from his home, when, in fact, as he then and there well know and believed, the Forged Order was faxed from his home" (emphasis added).

At trial, however, two agents testified from notes—there was no recording or transcript—that the defendant never *admitted* that he sent the bogus order (Tr. 601, 770, 778).

As one agent said, "He never told us that he sent the fraudulent order" (Tr. 778). Defendant testified that, in response to the agent's alleged offer of non-prosecution if he would say it was a *joke*, "no, I told them distinctly no matter what, no matter [what] the consequences are . . . I would never say that [it was a joke]. I didn't do it [; a]s I sit here today, I will never say that I did something I didn't do." (Tr. 896).

Despite the lack of a specific question and a specific answer, the Second Circuit agreed with the district court's conclusion that the jury could infer from this testimony that "defendant denied having sent the forged order to the Davidson firm."

Other Circuits have rejected the notion that a conviction under 18 U.S.C. § 1001(a)(2) can rest upon what the agents believe an individual meant; there must be clear evidence of what was said and a full appreciation of the context in which the statement was made. *See, e.g., United States v Jiang*, 476 F.3d 1026 (9th Cir. 2007); *United States v Good*, 326 F.3d 589 (4th Cir. 2003); *United States v Sainz*, 772 F.2d 559 (9th Cir. 1985).

In *Jiang*, as here, the interview was not recorded and there was no specific question and denial. Finding the exchange ambiguous, the Ninth Circuit reversed, observing that the agent should have asked a specific question. Quoting from *Sainz*, the Court said, "'[T]he consequences of imprecision in the language used to question a witness must be laid at the table of the questioner, not the questioned.'" 476 F.3d at 1030, quoting *Sainz*, 772 F.2d at 564. The conviction could not be sustained on that theory that the agent "thought" that the defendant had meant his response to be.

If *Jiang, Sainz*, and the decisions they relied upon, are correct, the conviction here could not stand either. The agents said that defendant never *admitted* that he sent the false order. The indictment, however, charged that defendant made an affirmative statement. Defendant's testimony that he rejected the agent's offer to say that the episode was a joke doesn't turn the lack of an admission into an affirmative statement. All defendant said was that, as he was sitting in court, he wouldn't say that he did "it."

This case thus presents the Court with the opportunity to resolve the conflict in the Circuits and squarely hold that there must be a specific question and a specific answer, as reflected in a recording, transcript, or other written document. A conviction should not be based on surmise, supposition or conjecture. The lack of precision falls on the agents, not the defendant.

F. Depending Upon this Court's Decisions in *Clairborne v United States*, Docket No. 06-5618, and *Rita v United States*, Docket No. 06-5754, the Case Should Be Remitted for Reconsideration of Sentence.

The pre-sentence report calculated the defendant's combined adjusted offensive level at 18, which included a two point enhancement for abuse of a "special skill" (U.S.S.G. § 3B1.3) and a two point enhancement for obstruction of justice (U.S.S.G. § 3C1.1). The Court also considered the prosecution argument that defendant's purportedly unauthorized change in a life insurance policy was a strong factor to consider in imposing sentence (S. 35).

Although the Second Circuit, among others, has held that the confrontation clause, U.S. Const., Admt. VI, and

this Court's decision in *Crawford v Washington*, 541 U.S. 36 (2004), have no impact in sentencing, *see, United States v Martinez*, 413 F.3d 239, 243 (2d Cir. 2005), it may be that *Clairborne* and *Rita* will address this and other issues. If so, the defendant should have the benefit of those decisions.

CONCLUSION

This case presents substantial issues of public importance that have divided the circuits.

The petition for certiorari should be granted.

Dated: Suffolk County, New York
May 29, 2007

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2006

(Argued: January 26, 2007 Decided: March 2, 2007)

Docket No. 06-1445-cr

UNITED STATES OF AMERICA,

Appellee,

v.

PERRY REICH,

Defendant-Appellant.

Before:

KEARSE and SOTOMAYOR, *Circuit Judges*,
and KOELTL, *District Judge*.[1]

Defendant-appellant Perry Reich appeals from a judgment of conviction on one count of corruptly obstructing a judicial proceeding, in violation of 18 U.S.C. § 1512(c)(2), one count of forging a judge's signature, in violation of 18 U.S.C. § 505, and one count of making a false statement to a federal officer, in violation of 18 U.S.C. § 1001(a)(2), in connection with his fabrication of a court order. We hold principally that (1) 18 U.S.C. § 1512(c) requires a nexus

[1] The Honorable John G. Koeltl, United States District Judge for the Southern District of New York, sitting by designation.

between a defendant's conduct and the effect on the judicial proceeding, as described in *United States v. Aguilar*, 515 U.S. 593 (1995), and that the trial evidence in this case was sufficient to establish such a nexus; and (2) 18 U.S.C. § 505 does not require an intent to defraud. We also reject Reich's other challenges. The judgment of conviction of the United States District Court for the Eastern District of New York (Garaufis, J.) is AFFIRMED.

AMY BUSA, Assistant United States Attorney (Roslynn R. Mauskopf, United States Attorney, Eastern District of New York, David C. James, Assistant United States Attorney, *on the brief*), Brooklyn, New York, *for appellee*.

MARK M. BAKER (Benjamin Brafman, Karen A. Newirth, *on the brief*), Brafman & Associates, P.C., New York, New York, for *defendant-appellant*.

SOTOMAYOR, *Circuit Judge*:

Defendant-appellant Perry Reich appeals from the March 31, 2006 and the May 1, 2006 amended judgment of the United States District Court for the Eastern District of New York (Garaufis, J.), convicting him, following a jury trial, of one count of corruptly obstructing a judicial proceeding, in violation of 18 U.S.C. § 1512(c)(2), one count of forging a judge's signature, in violation of 18 U.S.C. § 505, and one count of making a false statement to a federal officer, in violation of 18 U.S.C. § 1001(a)(2), in connection with his fabrication of a court order. Reich challenges his conviction on all three counts, his sentence to twenty-seven months imprisonment, and the district

court's March 10, 2006 denial of his motions for a judgment of acquittal, for a new trial, and for bail pending appeal, *United States v. Reich*, 420 F. Supp. 2d 75 (E.D.N.Y. 2006). Reich raises five issues on appeal: (1) that there was insufficient evidence to establish that his conduct would have the "natural and probable effect" of obstructing the lawsuit, such that a conviction for obstruction of justice under 18 U.S.C. § 1512(c)(2) was inappropriate; (2) that the jury should have been instructed to find, and evidence was required to establish, an intent to defraud under 18 U.S.C. § 505; (3) that it was error to permit the government to crossexamine Reich's character witness by asking about an allegedly "private" unauthorized change to his law partner's life insurance policy; (4) that there was insufficient evidence to establish that he made a false statement to a government agent; and (5) that the district court improperly applied a "special skills enhancement" in calculating Reich's sentence under the United States Sentencing Guidelines Manual ("U.S.S.G." or "Guidelines"). We disagree with all of Reich's arguments on appeal and affirm his conviction on all counts.

BACKGROUND

The following account is drawn from the evidence adduced at trial before Judge Nicholas G. Garaufis.

The Ryan Beck Lawsuit

Sometime before the activity that gave rise to Reich's criminal conviction, Reich, who is a lawyer, commenced through counsel an arbitration proceeding against a brokerage firm he alleged had mishandled his account. This firm was subsequently acquired by Ryan Beck & Co. ("Ryan Beck"), another brokerage firm, and Reich

amended his arbitration claim to include Ryan Beck as a respondent. In July 2002, Ryan Beck filed a lawsuit in the Eastern District of New York, seeking to enjoin Reich and several other defendants, also former investors who had filed arbitration claims (collectively, the "investor-defendants"), from arbitrating against it. *Ryan Beck & Co. v. Fakih*, No. 02 Civ. 4052 (E.D.N.Y.) ("*Ryan Beck v. Fakih*" or the "Ryan Beck lawsuit").[2] The case was assigned to Chief Judge Edward R. Korman, who referred the preliminary injunction motion to Magistrate Judge Roanne L. Mann; eventually, the parties agreed to have Magistrate Judge Mann preside over the entire case. *See* Order, *Ryan Beck v. Fakih*, No. 02 Civ. 4052 (E.D.N.Y. Nov. 7, 2002) (Docket Entry No. 49).[3]

In September 2002, Magistrate Judge Mann issued an order denying Ryan Beck's motion for a preliminary injunction staying arbitration, and on June 4, 2003, she issued another order denying Ryan Beck's motion for reconsideration of that decision. *See* Order, *Ryan Beck v. Fakih*, No. 02 Civ. 4052 (E.D.N.Y. Sept. 23, 2002) (Docket Entry No. 28); Order, *Ryan Beck v. Fakih*, No. 02 Civ. 4052 (E.D.N.Y. June 4, 2003) (Docket Entry No. 83) (the "June 3 Order").[4] Because the June 3 Order did not resolve Ryan Beck's outstanding summary judgment motion, however, Ryan Beck's attorney, Joel Davidson ("Davidson"),

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[2] Though a lawyer, Reich was represented by counsel in the proceedings. Civil Docket, *Beck & Co. v. Fakih*, No. 02 Civ. 4052 (E.D.N.Y.).

[3] The Order was signed September 11, 2002, but was not docketed until November 7, 2002.

[4] Though this Order was docketed June 4, Magistrate Judge Mann signed it on June 3. Because the district court and the parties have referred to it as the "June 3 Order," we now do so for consistency.

of the law firm Davidson & Grannum, filed an application for a writ of mandamus in the United States Court of Appeals for the Second Circuit to compel Magistrate Judge Mann to issue a ruling.

The Forged Order

On June 17, 2003, at approximately 11:10 a.m., Davidson & Grannum's law office received a four-page fax transmission that purported to be, but was not, an order issued by Magistrate Judge Mann ("the forged Order"), which was dated June 17, 2003, and bore Magistrate Judge Mann's fax header and signature. The forged Order directed that "[t]he orders denying the preliminary injunction are recalled and vacated, and defendant Fakih and its counsel are enjoined from proceeding with the arbitration hearing against Ryan Beck and the brokers." It also recused Magistrate Judge Mann from further proceedings in the case, stating that she had discussed the suit with Chief Judge Korman, "who recommended to me that I recuse myself from the case and return the matter to him. . . . Given the manner in which I have handled this case, a reasonable person would believe that I was not impartial, and recusal logically follows." Finally, the order returned the matter to Chief Judge Korman and stated:

> The parties shall notify Chief Judge Korman by letter whether they consent to further proceedings before a different Magistrate Judge, whether the matter can be decided on the basis of the current submissions without the necessity for additional argument, and whether . . . sanctions may be imposed against and [sic] of the defendants.

The forged Order bore similarities to the June 3 Order: It had the same caption, final page, and fax header, and was faxed at the same time of day. The date of the forged Order appeared to have been changed by hand, and one part of the text alignment was skewed. The forged Order also contained information that only someone familiar with the Ryan Beck lawsuit would know; for example, it included details of the June 3 Order and contained a phrase—"mixing apples and oranges"—that Davidson occasionally used during the litigation. Telephone records produced at trial indicated that at 11:08 a.m. on June 17, a call lasting several minutes was initiated to Davidson's fax machine from Reich's home using a pre-paid calling card.

Davidson's secretary found the forged Order in the fax tray shortly after 11 a.m., and handed it to another lawyer at Davidson's firm; that attorney faxed the forged Order to Davidson, who was at home. In response to the forged Order, Davidson wrote a letter to the Second Circuit withdrawing his application for a writ of mandamus, which he understood the forged Order to render moot. Because the forged Order purported to enjoin only one of the investor-defendants from arbitrating, however, Davidson also contacted Chief Judge Korman to inquire how he should proceed regarding the remaining investor-defendants. In addition, Davidson circulated the forged Order to various arbitration panels and attorneys representing Ryan Beck in other jurisdictions.

Magistrate Judge Mann learned of the forged Order sometime in the afternoon of June 17 or June 18, when the attorney for one of the investor-defendants called her chambers to say he had heard that she had issued a decision. On June 18, she signed an order stating that the forged Order was fraudulent, had not been issued by the

court, and should not be relied on in any manner. *See* Order, *Ryan Beck v. Fakih,* No. 02 Civ. 4052 (E.D.N.Y. June 23, 2003) (Docket Entry No. 110). She also contacted the Second Circuit so that it would not rely on the forged Order for purposes of considering the mandamus application, and notified the United States Attorney's Office for the Eastern District of New York of the forged Order. The United States Attorney's Office referred the matter to the Federal Bureau of Investigation ("FBI") for investigation.

Reich's Pretrial and Trial Statements

After the FBI's initial investigative efforts yielded phone records linking Reich's phone number to the fax transmission of the forged Order, FBI agents interviewed Reich at the end of July 2003. Reich denied having any contact with Davidson on June 17, and denied using prepaid telephone cards. The agents again spoke to Reich in August, when they searched his home pursuant to a warrant. Reich stated that he may have contacted Davidson regarding a confidentiality agreement. When an agent asked Reich why telephone records would reflect a several-minute connection between his phone and the Davidson fax machine, Reich stated that he may have dialed the fax line inadvertently and hung up. To explain why such an inadvertent call would last over three minutes, he stated that his phone did not always disconnect the line immediately upon hanging up.

The following March, Reich and his attorney met with the FBI agents for a proffer session. When asked whether he had called Davidson, Reich reiterated that he had dialed the Davidson fax by mistake, and again denied owning or using calling cards, although he said he had purchased one

for his girlfriend. The agents offered Reich the opportunity to state that he had sent the forged Order as a "joke." According to Reich's testimony at trial, he responded: "No, I told them distinctly no matter what, no matter [what] the consequences . . . were to me I said I would never, never say that. I didn't do it. As I sit here today, I will never say that I did something I didn't do."

At trial, Reich continued to deny creating the forged Order. He stated that he had tried to call Davidson's phone line to discuss a discovery issue and engage in settlement discussions, but dialed Davidson's fax number by mistake and subsequently hung up. He admitted using a calling card to make the call, but said he had done so because he was having trouble with his phone service.

Asked about his fax capabilities, Reich admitted he owned a fax modem the government had seized during its search. He was also questioned about whether he owned a Canon Fax Phone 8, the manual to which had been found in his home. He admitted he had once owned such a machine but claimed that he had discarded it several years earlier.

Fax Testimony at Trial

The government called a fax expert at trial, who testified that the evidence was consistent with the forged Order having been faxed from Reich's home. For example, the length of the call was consistent with the transmission of a four-page document, and the fax log records could not have been generated from an inadvertent phone call because Davidson's fax machine, which would have received the phone call, was designed to terminate such calls after forty-one seconds. The expert also stated that because of the page numbering on the forged Order, he

could tell that the last three pages of the fax had been transmitted as a single long sheet. Reich's fax expert countered that Reich's fax modem could not have transmitted the final three pages as a single sheet, and so could not have been used to transmit the forged Order found in Davidson's fax tray. He admitted, however, that he had not tested a Canon Fax Phone 8. The government's rebuttal witness testified that a Canon Fax Phone 8 could have transmitted the forged Order.

Character Testimony at Trial

Reich called James Pelzer, Clerk of the Court, New York State Supreme Court, Appellate Division, Second Department, as a character witness. Pelzer testified that he and others believed Reich to be a person of honesty and integrity. On cross-examination, the government sought to ask Pelzer about an incident in which Reich, immediately after learning that his law partner Steven Schapiro had terminal cancer, allegedly changed the beneficiary of Schapiro's life insurance plan from Schapiro's family to the partnership without first notifying him as the partnership agreement required. Following an objection by defense counsel and a discussion outside the jury's presence, Judge Garaufis permitted the government to ask the following question: "[I]f I told you that Mr. Reich had changed the beneficiary of an insurance policy away from Mr. Schapiro's family members, designating the law firm the beneficiary in the event of Mr. Schapiro's death, without notice to Mr. Schapiro and in violation of the partnership agreement that the two of them had, would that change your opinion or the opinion of the community . . . with regard to the defendant's honesty or good character?" Trial Tr. 847. Pelzer responded that it might.

When Reich testified in his own defense, he explained that he had notified Schapiro before changing the policy beneficiary, and that he had done it in order to protect the firm with regard to money loaned by Schapiro's mother to Schapiro, for which the firm was responsible.

Conviction, Sentencing, and Post-Trial Motions

After deliberations on August 25, 2005, the jury returned a verdict of guilty on all three counts. Reich moved for a judgment of acquittal and for a new trial pursuant to Federal Rules of Criminal Procedure 29 and 33, alleging insufficient evidence to support convictions on any of the three counts, improper impeachment of a character witness, and improper rebuttal.[5] *See Reich*, 420 F. Supp. 2d at 81. He also moved for bail pending appeal. Judge Garaufis denied the motions for a judgment of acquittal and for a new trial, holding principally that there was sufficient evidence that Reich sent the forged Order, that he obstructed an official proceeding within the meaning of § 1512(c)(2), and that he made a false statement to the FBI. *Reich*, 420 F. Supp. 2d at 82-85. Judge Garaufis also denied Reich's motion for bail pending appeal, finding that his rulings did not raise any substantial questions for appeal. *Id.* at 90-91.

The presentence report prepared by the United States Probation Department calculated Reich's combined adjusted offense level as 18. This included a "special skills enhancement," *see* U.S.S.G. § 3B1.3, on all three counts, based on the Probation Department's conclusion that Reich's special skills as an attorney facilitated his crimes. At sentencing, Judge Garaufis found the enhancement warranted and

[5] He subsequently amended those motions, but did not change in any way their significant underlying bases.

applied it to all three counts. He found the Guidelines range of 27 months to 33 months to be reasonable and sentenced Reich to 27 months' imprisonment. This appeal followed.

DISCUSSION

We address each of Reich's challenges to his conviction in turn.

I. Obstruction of Justice

Reich challenges as insufficient the evidence supporting his conviction for obstruction of justice under 18 U.S.C. § 1512(c)(2), which subjects to criminal liability one who "corruptly . . . obstructs, influences, or impedes any official proceeding, or attempts to do so." In *United States v. Aguilar*, 515 U.S. 593 (1995), the Supreme Court construed the intent element of 18 U.S.C. § 1503, whose relevant language is substantially similar to the relevant language in 18 U.S.C. § 1512(c)(2),[6] to include a "nexus requirement." *Id.* at 600 (internal quotation marks omitted); *see also United States v. Schwarz*, 283 F.3d 76, 108 (2d Cir. 2002). To satisfy this requirement, the defendant's conduct must "have a relationship in time, causation, or logic with the judicial proceedings"; in other words, "the endeavor must have the natural and probable effect of interfering with the due administration of justice." *Aguilar*, 515 U.S. at 599 (internal quotation marks omitted). Reich concedes that the necessary nexus can exist when the discre-

[6] Section 1503, titled "Influencing or injuring officer or juror generally," subjects to criminal liability one who corruptly "endeavors to influence, intimidate, or impede" an officer or juror or "influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice." 18 U.S.C. § 1503(a).

tionary actions of a third person are required to obstruct the judicial proceeding, but he alleges that the evidence adduced at trial failed to establish such a nexus because it was not foreseeable to Reich that the third party, Davidson, would act on the forged Order in such a way as to obstruct the judicial proceeding.

This Circuit has not previously applied *Aguilar*'s nexus requirement to § 1512(c)(2). We have, however, applied it not only to § 1503, *see Schwarz,* 283 F.3d at 108-09, but also to 18 U.S.C. § 1505, which subjects to criminal liability one who "corruptly . . . influences, obstructs, or impedes . . . the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States," *see United States v. Quattrone*, 441 F.3d 153, 174 (2d Cir. 2006). The language of § 1505 is even more similar to § 1512(c)(2) than is § 1503, and given that the parties have not disputed *Aguilar*'s application to § 1512(c)(2), there is no reason not to apply it. *See Quattrone*, 441 F.3d at 170 n.18 (stating that the parties had treated §§ 1503 and 1505 "the same for analytical purposes" and that the court saw "no reason for taking a different tack" because "[t]he only relevant distinction between the two statutes—at least in the context of this case—lies in the attendant circumstances of the obstruction"). Accordingly, we hold that § 1512(c)(2) incorporates a "nexus requirement" as articulated in *Aguilar*.

Reich has failed to show that the evidence was insufficient to establish a nexus between his actions and obstruction of the proceeding. *See United States v. Matthews*, 20 F.3d 538, 548 (2d Cir. 1994) (describing the "heavy burden" on defendants who challenge the sufficiency of evidence). Because the forged Order appeared to render moot Ryan Beck's application to the Second Circuit for a writ of

mandamus, it was foreseeable that upon receiving the forged Order, Davidson would withdraw the application, as he in fact did. In addition, because the forged Order expressly invited the parties to contact Chief Judge Korman regarding further proceedings, it was foreseeable that Davidson would contact Chief Judge Korman, as he in fact did. This evidence is clearly sufficient to establish a "relationship in time, causation, or logic" between Reich's transmission of the forged Order and effects on the judicial proceeding, as *Aguilar* requires. 515 U.S. at 599. Moreover, that relationship is much closer than those found insufficient in *Aguilar* or *Schwarz*, where the defendants merely made false statements to agents who might or might not later testify before a grand jury. *See Aguilar*, 515 U.S. at 600; *Schwarz*, 283 F.3d at 109. It is also closer in time, causation, and logic than the relationship found sufficient in *Quattrone*, where the defendant sent an email to his staff endorsing a suggestion to destroy documents that might eventually be subpoenaed by a grand jury. 441 F.3d at 166, 172. Here, by contrast, Reich directly injected a false order into ongoing litigation to which he was a party. The forged Order purported to enjoin a party from acting in an arbitration, directed the parties to contact Chief Judge Korman, and mooted a party's application before the Second Circuit, thereby inducing that party to withdraw it. The effects of the forged Order were more "natural and probable" than those in *Aguilar*, *Schwarz*, or *Quattrone*.

Reich also claims that no "obstruction" occurred within the meaning of § 1512(c)(2) because there was no evidence that "the fairness or outcome of the Ryan Beck lawsuit was affected in any way." He observes that unlike the language of § 1503, which contemplates action affecting the "due administration of justice," § 1512(c)(2) contemplates only

actions affecting "any official proceeding." This difference, Reich contends, indicates Congress's intent not to criminalize under § 1512(c)(2) actions that impact the administration of justice but that do not "actually" affect the outcome of the official proceedings. This interpretation, however, is inconsistent with the plain language of the statute, which encompasses all actions that "corruptly . . . influence[]" a proceeding—or even attempt to do so—not merely those that affect its ultimate outcome. Moreover, the injection of the forged Order into the Ryan Beck lawsuit at the very least "influence[d]" the proceedings, in that it caused a litigant to withdraw a filing and contact a judge, and caused Magistrate Judge Mann to issue an order explaining the falsity of the forged Order and to convene a status conference to discuss it.

II. Forgery of a Judge's Signature

Reich claims the district court erred in failing to instruct the jury that the forgery count under 18 U.S.C. § 505 requires proof of intent to defraud. Acknowledging that § 505, which makes it a crime to "forge[] the signature of any judge . . . of any court of the United States . . . or forge[] or counterfeit[] the seal of any such court, or knowingly concur[] in using any such forged or counterfeit signature or seal, for the purpose of authenticating any proceeding or document," does not on its face require an "intent to defraud," Reich nonetheless argues that we should find such a requirement because it is an element of common-law forgery, and the common law should inform our interpretation of federal criminal statutes.

Whether § 505 requires an intent to defraud is an issue of first impression for this Court, but two other circuits have addressed it. In 1931, the Sixth Circuit endorsed the

view Reich now advances, holding that Congress intended § 505 to include the common-law element of intent to defraud. *Levinson v. United States*, 47 F.2d 470, 471 (6th Cir. 1931);[7] *see also United States v. Bertrand*, 596 F.2d 150, 152 (6th Cir. 1979) (referring to *Levinson* and finding that the appeal was governed by *stare decisis*). The Tenth Circuit, however, drew the opposite conclusion.[8] *United States v. Cowan*, 116 F.3d 1360, 1361 (10th Cir. 1997). We now join the Tenth Circuit in holding that § 505 does not require an intent to defraud.

In interpreting a statute, "[w]e start, as always, with the language of the statute." *Williams v. Taylor*, 529 U.S. 420, 431 (2000). The text of § 505 contains no intent-to-defraud element; "[t]o the contrary, § 505's plain language only requires that a defendant . . . knowingly forge the signature of a federal judge 'for the purpose of authenticating any proceeding or document.'" *Cowan*, 116 F.3d at 1362 (quoting 18 U.S.C. § 505).

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[7] The version of 18 U.S.C. § 505 analyzed in *Levinson* was part of a predecessor statute to the current § 505, which was enacted in 1948, *see* Pub. L. No. 80-772, 62 Stat. 683 (1948), but the relevant language is identical.

[8] Reich claims that two additional Circuits have joined the Sixth in holding that § 505 requires an intent to defraud, but neither of the cases he cites actually reached that question. *See United States v. London*, 714 F.2d 1558, 1563-64 (11th Cir. 1983) (looking to the scope of common law forgery for the unrelated purpose of shedding light on whether passing off a photocopy of a judge's signature as an original fell within the ambit of § 505, but not addressing the question of intent to defraud, which was not before the court); *United States v. Dyer*, 546 F.2d 1313, 1316 (7th Cir. 1976) (expressly declining to reach the question of whether § 505 required an intent to defraud because the court below erred in failing to find an unrelated "essential element," though suggesting in dictum that "much could be said for" the view that § 505 did require an intent to defraud).

It is true that courts frequently construe an undefined statutory term in a federal criminal statute to carry its common-law meaning, *see United States v. Turley*, 352 U.S. 407, 411 (1957), and that the common-law crime of forgery required an intent to defraud, *see generally Moskal v. United States*, 498 U.S. 103, 121-28 (1990) (Scalia, J., dissenting). But it is also well-established that courts should not assign a common-law meaning to a statutory term "when that meaning is . . . inconsistent with the statute's purpose." *Taylor v. United States*, 495 U.S. 575, 594-95 (1990); *see also Moskal*, 498 U.S. at 117 ("Congress' general purpose in enacting a law may prevail over th[e] rule of statutory construction" that terms be given their common-law meanings.). Here, we agree with the Tenth Circuit that to import the common-law element of intent to defraud into § 505 would thwart Congress's goal in enacting the provision. *See Cowan*, 116 F.3d at 1363.

Historically, the term "to defraud" has "refer[red] to 'wronging one in his property rights by dishonest methods or schemes,' and 'usually signif[ied] the deprivation of something of value by trick, deceit, chicane or overreaching.'" *McNally v. United States*, 483 U.S. 350, 358 (1987) (quoting *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924)). By contrast, § 505 is concerned not with protecting private parties from financial loss, but with protecting the integrity of a government function—namely, federal judicial proceedings. "In considering a statute enacted for the protection of the government," we need not interpret a term "from the same standpoint from which the question would be considered if the word . . . were used in a state statute enacted for the protection of ordinary property rights of individuals . . . [because] in the one instance the statute in its ordinary acceptation has reference to

property and property rights alone, while in the other it has reference to a broader purpose, that of protecting the government in its administration under the law . . . ." *Curley v. United States*, 130 F. 1, 8 (1st Cir. 1904) (finding that a statute penalizing conspiracies to "defraud" the United States encompassed conspiracies not aimed at property interests); *see also McNally*, 483 U.S. at 359 & n.8 (citing *Curley* with approval). When an individual forges a judge's signature in order to pass off a false document as an authentic one issued by the courts of the United States, such conduct implicates the interests protected by § 505 whether or not the actor intends to deprive another of money or property. To construe § 505 to proscribe such conduct is "true to both its text and purpose." *Cowan*, 116 F.3d at 1363.[9]

A survey of the counterfeiting and forgery provisions of Title 18, Chapter 25, in which § 505 appears, supports this interpretation. The current § 505 was enacted in 1948 along with the bulk of the other provisions appearing in Chapter 25. *See* Pub. L. No. 80-772, 62 Stat. 683 (1948) (the "1948 Act"). Of those provisions, some very clearly require an intent to defraud, *see, e.g.*, 18 U.S.C. § 471 (prohibiting forgery of federal obligations and securities with "intent to defraud"); 18 U.S.C. § 478 (prohibiting forgery of foreign obligations and securities "with intent to defraud"); 18 U.S.C. § 482 (prohibiting forgery of foreign bank notes "with intent to defraud"), while others do not contain such a requirement, *see. e.g.*, 18 U.S.C. § 493 (prohibiting forgery of writings issued by certain federal lending agencies); 18 U.S.C. § 496 (prohibiting forgery of

[9] We note, as did the Tenth Circuit, that there is "[n]o elucidating legislative history" of § 505, making us even more "hesitant to stray from the plain language of the statute." *Cowan*, 116 F.3d at 1363.

documents pertaining to imports and customs duties), and still others enumerate several crimes, only one or some of which require an intent to defraud, *see, e.g.*, 18 U.S.C. § 506 (prohibiting, without mention of intent to defraud, the "false[] mak[ing], forge[ry], counterfeit[ing], mutilat[ion], or alter[ation]" of the seal of any U.S. department or agency, but prohibiting the possession, sale, or other transfer of such fraudulent seal only with "fraudulent intent").[10] This variation strongly suggests that Congress deliberately chose to require an intent to defraud for some forgery and counterfeiting crimes, but not for others. *Cf. Whitfield v. United States*, 543 U.S. 209, 216 (2005) (stating that Congress's inclusion of an express overt-act requirement in many conspiracy statutes, but not the one considered by the Court, "clearly demonstrat[ed] that it knows how to impose such a requirement when it wishes to do so").

We also note that of the provisions originally enacted in the 1948 Act, those requiring an intent to defraud were generally oriented toward a different purpose than those not requiring such an element. Provisions in the first category frequently criminalized forgeries and counterfeits likely to be used to defraud private citizens out of their money or property—for example, the forgery of U.S. and foreign obligations and securities, 18 U.S.C. §§ 471, 478. Those in the second category, meanwhile—like § 505—criminalized activities likely to impugn the reputation or integrity of the federal government regardless of whether

[10] Still other provisions contain other intent requirements. *See, e.g.*, 18 U.S.C. § 473 (prohibiting dealing in counterfeit obligations or securities when the actor has "the intent that the same be passed, published, or used as true and genuine"); 18 U.S.C. § 474 (prohibiting possession of plates or stones used for printing U.S. securities with "intent to use such plate, stone, or other thing . . . in forging or counterfeiting").

the perpetrator intended to defraud private citizens. *See, e.g.*, 18 U.S.C. § 497 (prohibiting forgery of letters patent); 18 U.S.C. § 498 (prohibiting forgery of military discharge papers); 18 U.S.C. § 506 (prohibiting forgery of the seal of any U.S. department or agency). In those provisions enumerating separate but related crimes and assigning different intent requirements to each, those crimes most likely to defraud private citizens were the ones containing an intent-to-defraud element. *See, e.g.*, 18 U.S.C. § 485 (requiring an "intent to defraud" to "*pass[], utter[], publish[], [or] sell[]*" counterfeit coins or bars, but not to "*falsely make[], forge[], or counterfeit[]*" such coins or bars (emphasis added)); 18 U.S.C. § 507 (prohibiting the forgery of ship's papers without an intent to defraud, but prohibiting the "utter[ing], publish[ing], or pass[ing]" of such papers only with "intent to defraud"). Section 505's prohibition on forging a judge's signature, which is concerned with preserving the integrity of the courts, falls logically into the category of crimes Congress intended to penalize even when the actor did not intend to deprive others of money or property. In light of this meaningful variation, we decline to read into § 505 an intent-to-defraud element Congress chose to omit.

In sum, like the Tenth Circuit, we hold that engrafting an intent-to-defraud element onto § 505 would not effectuate Congress's intent, and we find no error in the district court's jury instruction on the § 505 count omitting an intent-to-defraud requirement.

As an additional matter, Reich claims that there was insufficient evidence to demonstrate that he personally forged Magistrate Judge Mann's signature. Now conceding that there was evidence that the forged Order was faxed from his home, Reich argues that this could at most show that he "knowingly concur[red]" in the forgery, which,

though also prohibited under § 505, is not the crime with which the government charged him. There was ample evidence presented at trial, however, that Reich himself forged the Order. For example, the government presented evidence that the author of the forged Order was intimately familiar with the Ryan Beck lawsuit and that the forged Order was faxed from Reich's residence. It is well-established that in considering a defendant's challenge to his conviction based on insufficiency of the evidence, "the evidence [must] be viewed in the light most favorable to the government and all permissible inferences drawn in its favor," and that so long as "the evidence, thus construed, suffices to convince any rational trier of fact of the defendant's guilt beyond a reasonable doubt," the conviction must stand even if the government's case has not "exclude[d] every possible hypothesis of innocence." *United States v. Martinez*, 54 F.3d 1040, 1042-43 (2d Cir. 1995) (internal citations and quotation marks omitted).

III. Other Claims

A. Impeachment of Character Witness

Reich claims that the district court erred in permitting the government to cross-examine his character witness, James Pelzer, regarding Reich's having changed the beneficiary of his law partner's life insurance policy in violation of the partnership agreement.[11] In particular, Reich

[11] The Federal Rules of Evidence state that "[e]vidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same" is admissible, Fed. R. Evid. 404(a)(1), and may be made by "testimony as to reputation or . . . in the form of an opinion," Fed. R. Evid. 405(a). On cross-examination regarding reputation or opinion, "inquiry is allowable into relevant specific instances of conduct." *Id.*

cites *United States v. Monteleone*, 77 F.3d 1086, 1089-90 (8th Cir. 1996), for the proposition that the life insurance incident was "private in nature and not likely to have been known in the community at large," and thus was impermissible "'specific act' cross-examination." We review the district court's decision to allow the question for abuse of discretion, *United States v. Damblu*, 134 F.3d 490, 494 (2d Cir. 1998), bearing in mind that "[o]nce a defendant offers character testimony, the prosecution is afforded substantial latitude to rebut such evidence," *United States v. Russo*, 110 F.3d 948, 952 (2d Cir. 1997).

At the outset, we note that *Monteleone*, an Eighth Circuit case, is not binding in this Circuit. Even if it were, however, we would find that it does not render the district court's decision to permit the cross-examination an abuse of discretion. First, in *Monteleone*, the conduct in question—perjury before a grand jury—was "not likely to have been known in the community at large" only because it was "protected by an obligation of secrecy," and so "the only legitimate source of any rumors pertaining to Monteleone's [conduct] would have been Monteleone himself." *Monteleone*, 77 F.3d at 1090. In contrast, Reich's conduct with respect to the life insurance policy was not legally protected as a secret and was in fact known to a number of others besides Reich himself, including his partner's family and attorneys involved in dissolving the partnership. Second, the Eighth Circuit has clarified that *Monteleone* applies to reputation witnesses but not to opinion witnesses, because "[a] specific instance of misconduct, even if not of the kind generally known in the community, would be relevant to the witness's own opinion." *United States v. Bruguier*, 161 F.3d 1145, 1150 (8th Cir. 1998); *see also United States v. Birney*, 686 F.2d 102, 108 (2d Cir.

1982) (upholding trial court's admission of cross-examination question as to whether certain nondisclosures by the defendant in loan applications would affect the witness's opinion of the defendant's character). Pelzer, who testified both about his own impressions of Reich and those of the community, served as both a reputation and an opinion witness. Accordingly, because the question to which Reich objects was directed at least in part to his *opinion* testimony, it was proper regardless of whether it was generally known in the community. *See* Trial Tr. 847 ("[I]f I told you that Mr. Reich had changed the beneficiary of an insurance policy . . . *would that change your opinion* or the opinion of the community . . . with regard to the defendant's honesty or good character?" (emphasis added)). We also reject Reich's challenge that the cross-examination was unconstitutional because it "forced" or "compelled" him to testify. The questioning may have affected his trial strategy, but it certainly did not force him to testify.[12]

B. False Statement Charge

Reich argues that the evidence adduced at trial was insufficient to prove "the precise allegation in the indictment" with respect to the false statement charge, which alleged specifically that on March 4, 2004, Reich told the FBI agents that the forged Order had not been faxed from his home. Reich contends that the agents testified at trial only that Reich had not *admitted* faxing the Order, not that he *denied* faxing it. The former is not "an express denial," he claims; rather, it is merely a "lack of forthrightness." Because the indictment charged him with an express

[12] On appeal, Reich did not challenge the form of the question posed to his character witness, which took the form of a hypothetical.

denial, Reich argues, finding him guilty based on a lack of forthrightness would constitute a constructive amendment of the indictment.

As the district court found, however, Reich's argument is "contrary to the facts." *Reich*, 420 F. Supp. 2d at 85. One of the agents testified that when confronted with the phone records, Reich stated that he had called the Davidson fax machine by mistake when trying to reach Davidson about a deposition. Moreover, Reich himself testified that, when asked if he would admit sending the forged Order in order to avoid prosecution, he said: "No, I told them distinctly no matter what, no matter [what] the consequences . . . were to me I said I would never, never say that. I didn't do it. As [I] sit here today, I will never say that I did something I didn't do." Trial Tr. 896. This testimony would have permitted a rational juror to find that Reich denied having sent the forged Order. Thus, unlike the defendant in *Bronston v. United States*, 409 U.S. 352 (1973), a perjury case Reich cites as analogous, Reich was not convicted based on a response that was "literally true" but "arguably misleading." *Id.* at 353, 362 (finding that the perjury statute did not criminalize the making of such statements).

C. Special Skills Enhancement

Finally, Reich argues that the district court improperly applied a two-level special skills sentence enhancement, *see* U.S.S.G. § 3B1.3, to his convictions on the counts of obstruction of justice ("Count One") and making a false statement to a federal officer ("Count Three"). The special skills enhancement provides for a two-level increase in the Guidelines range whenever a defendant used a special skill "in a manner that significantly facilitated the commission or concealment of the offense." *Id.*; *see also id.* cmt. n.4

(naming "lawyers" as an example of individuals possessing special skills). Reich does not challenge the enhancement's application to the count of forgery ("Count Two"). He contends, however, that his special skills did not "significantly facilitate[]" either of the other counts.

First, Reich claims that the "sole basis" for the obstruction of justice charge was *faxing* the forged Order, and that his legal skills and training did not facilitate his use of the fax machine. The district court's "determination of whether a defendant utilized a . . . special skill in a manner that significantly facilitated the commission . . . of the offense is a question of fact reviewed for clear error." *United States v. Thorn*, 446 F.3d 378, 388 (2d Cir. 2006). Count One of the indictment charged Reich broadly with "knowingly, intentionally and corruptly obstruct[ing], influenc[ing] and imped[ing] an official proceeding." This necessarily included the creation of the forged Order, without which the obstruction, influencing, or impeding of the judicial proceeding would have been impossible. Because Reich used his special skills as a lawyer to create the forged Order, it was not clear error for the district court to apply the enhancement to Count One.

Because we affirm the district court's application of the enhancement to Count One, we need not resolve Reich's challenge to the application to Count Three because the three counts of conviction were grouped pursuant to section 3D1.2(c) of the Guidelines. The offense level for the grouped counts was determined by reference to "the highest offense level of the counts in the Group," U.S.S.G. § 3D1.3(a), which was level 18 for Count One. Thus the decision to apply the enhancement to Count Three had no effect on Reich's sentencing. *See United States v. Richards*, 302 F.3d 58, 72 (2d Cir. 2002) (finding "no persuasive

grounds for a sentencing remand" when a defendant's challenge to one aspect of his sentence, even if successful, "would have no effect" on his term of imprisonment).

CONCLUSION

For the foregoing reasons, we find that (1) 18 U.S.C. § 1512(c) requires a nexus between a defendant's conduct and the effect on the judicial proceeding, as described in *United States v. Aguilar*, 515 U.S. 593 (1995), and that the trial evidence in this case was sufficient to establish such a nexus; (2) 18 U.S.C. § 505, criminalizing the forgery of a judge's signature, does not require an intent to defraud, and the evidence was sufficient to support Reich's conviction under the statute; (3) the district court did not abuse its discretion in permitting the government to cross-examine Reich's character witness regarding Reich's change to his law partner's life insurance policy because character witness was an opinion witness as well as a reputation witness; (4) the evidence was sufficient to establish that Reich personally created the forged Order; and (5) the district court's application of a special skills enhancement to Reich's conviction under 18 U.S.C. § 1512(c), after concluding that his skills as a lawyer facilitated the underlying conduct, was not clearly erroneous, and the enhancement was therefore proper. The judgment of conviction is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

04-Cr.-587(NGG)

UNITED STATES OF AMERICA

—against—

PERRY REICH,

Defendant.

MEMORANDUM AND ORDER

GARAUFIS, United States District Judge

A jury found the Defendant Perry Reich ("Reich" or "Defendant") guilty of forgery of a judge's signature, of corruptly obstructing a judicial proceeding, and of making willfully false statements to Federal Bureau of Investigation ("FBI") agents. The Defendant now moves for a judgment of acquittal or, in the alternative, a new trial, pursuant to Rules 29(c) and 33 of the Federal Rules of Criminal Procedure, respectively, for bail pending appeal, and to modify the trial transcript. For the reasons stated below, the Defendants' motions are DENIED, except for the application to modify the transcript, which is GRANTED in part and DENIED in part.

I. FACTUAL BACKGROUND

Because the questions raised by Defendant in his post-trial motions require this court to look at the entire trial record, what follows is a detailed examination of the evidence presented at trial. Reich's convictions arise from a forged judicial order in *Ryan, Beck & Co. v. Fakih*, No. 02 Civ. 4052 (E.D.N.Y.) (Mann, J.) ("the Ryan Beck lawsuit"). Prior to the lawsuit, Reich, who held an account with Gruntal & Co. ("Gruntal"), a brokerage firm, filed an arbitration claim against Gruntal claiming a mishandling of his account, and then amended his claim to include Ryan Beck & Co. ("Ryan Beck"), another brokerage firm, after Ryan Beck purchased the assets of Gruntal. (Trial Transcript ("Tr.") 328-32.) In the Ryan Beck lawsuit, plaintiff Ryan Beck sought to enjoin investors, including Reich, from arbitrating these claims against it. (*Id.*)

A. Evidence Adduced at Trial

On June 17, 2003, at approximately 11:10 a.m., the law offices of Joel Davidson ("the Davidson firm"), the representative of Ryan Beck in the lawsuit, received by facsimile transmission a document that purported to be an order ("the forged Order"), dated June 17, 2003, issued by Magistrate Judge Roanne L. Mann, who was assigned to the Ryan Beck lawsuit. (Tr. 532-33; Gov. Ex. 1.) The forged Order recalled and vacated a previous order, dated June 3, 2003, denied a preliminary injunction, enjoined the parties from proceeding with an arbitration hearing and recused Judge Mann from further proceedings in the case. (Gov. Ex. 1.)

The forged Order was transmitted as a four page document, including a cover letter and three page Memorandum and Order. (Gov. Ex. 1.) The forged Order has Judge

Mann's fax header and her signature, and the cover page appears to be from the Eastern District of New York, with Judge Mann's address and telephone number. (*Id.*) However, the forged Order appears to have been fashioned from the June 3, 2003 Order, which has the same caption and same third page. (Tr. 532-33; Gov. Ex. 24; *compare* Gov. Ex. 1 *with* Ex. 31.) The date of the cover page, the fax header, and the forged Order appear to have been changed by hand, and the text of the forged Order is skewed. (Tr. 533; Gov. Ex. 1.) As explained in the expert testimony presented at trial, on the first page of the document "P 01" is printed upside-down at the bottom of the page, on the second page of the document "P 02" appears upside-down at the bottom of the page, the third page of the document states above the header "Extended Page 2.1," and on the last page of the document is printed upside-down at the bottom of the page, "Extended Page 2.2." (Gov. Ex. 1, 4.)

Phone records of Reich's home and the Davidson firm fax machine indicate that at 11:08 a.m., a call was initiated to the Davidson firm fax machine from a pre-paid AT&T calling card purchased by Reich. (Gov. Exs. 2, 35, 37.) Maureen Vollers, the secretary of Joel Davidson, who is counsel to Ryan Beck, testified that she found the forged Order on the Davidson firm fax machine tray shortly after 11:00 a.m. (Tr. 102-03, 129, 170.) Vollers and Naomi Weinberg, an associate at the Davidson firm, testified that Vollers handed Weinberg the forged Order between 11:15 and 11:20 a.m. (Tr. 104-105, 187.) Ms. Weinberg testified that she maintained control of the forged Order until she had it faxed to Joel Davidson at his home at approximately 12:30 p.m. (Tr. 183-90.) Joel Davidson testified that Reich was the only person with any relationship to the Ryan

Beck lawsuit who sent a facsimile transmission to that machine that day. (Tr. 358-60.)

In response to the forged Order, the Davidson firm withdrew its June 9, 2003 application for a writ of mandamus from the Second Circuit that it filed in response to Judge Mann's previous (and still controlling) June 3, 2003 Order. (Tr. 363-64.) Mr. Davidson contacted Judge Korman, the district court judge assigned to the case, to request that an order be entered applying the rulings in the forged Order to all other former investors in the Ryan Beck lawsuit. (Tr. 361.) Judge Mann then communicated in an order that the forged Order was not issued by her. She held a status conference in which she discussed the forged Order, and contacted the Second Circuit to inform it that the forged Order should not be relied on in deciding the writ of mandamus. (Tr. 536-38, 547-48; Gov. Ex. 24.) Judge Mann's law clerk, John Marco, testified that the forged Order substantially complicated the proceedings. (Tr. 547-48.)

B. Reich Pretrial Statements and Trial Testimony

Reich made four separate statements denying his involvement in the creation and transmission of the forged Order. Federal Bureau of Investigations (FBI) Special Agent Richard Wilfling testified that he and agent Robert Katzman interviewed Reich on July 31, 2003 ("July 31 interview"), in which Reich denied using pre-paid telephone cards, and could not recall having any interaction with Joel Davidson. (Tr. 576-77, 581.) He testified that he interviewed Reich again on August 11, 2003 ("August 11 interview"), during an FBI search of Reich's home, in which Reich admitted to contacting Joel Davidson regarding a confidentiality agreement that Reich may have faxed.

(Tr. 590-91.) Confronted with telephone records showing a connection for over three minutes on July 11, 2003 between his residence and the Davidson fax machine, agent Wilfling testified that Reich explained that he may have inadvertently called the Davidson firm fax machine and disconnected, and that the call lasted over three minutes because his telephone does not always disconnect after hanging up. (Tr. 591.)

Agent Wilfling further testified that on March 3, 2004, he, agent Katzman, a government prosecutor, and Reich and his counsel met in the United States Attorney's Office for a proffer session ("March 3 proffer session"). At that session, agent Wilfling testified that Reich denied owning or using an AT&T calling card, but said that he purchased a prepaid calling card for his girlfriend in 2002. (Tr. 599.) According to agent Wilfling, Reich reiterated that he had been trying to reach Joel Davidson, but that he accidentally dialed the Davidson firm fax machine, and that his telephone sometimes did not disconnect after a call ends. (Tr. 600-01.)

At trial, Reich denied that he created or sent the forged Order, but admitted that he called the Davidson firm fax machine number on June 17, 2003, at the time in question. (Tr. 886-87, 894, 896.) However, Reich testified that he did not intend to send a facsimile transmission, but rather had wanted to speak with Joel Davidson to resolve a discovery issue and engage in settlement discussions with the Davidson firm. (Tr. 885.) Reich explained that he dialed the fax number because he confused the Davidson fax and phone numbers from the Davidson firm letter head. (Tr. 887). He also testified that he used an AT&T calling card to make the call because he was having trouble connecting telephone calls with his Verizon account. (Tr. 886.) Lastly,

Reich testified that he did not actually connect with the Davidson firm, and he suggested that the telephone records showed a long communication because his computer fax modem sometimes engages his telephone line and causes the line to remain connected after the call has ended. (Tr. 887-88.)

Regarding his capability of sending the forged Order, at trial Reich admitted that he owned a fax modem that was seized by the government, and testified that at one time he owned a Canon Fax Phone 8, but he explained that he discarded the machine in 2000. (Tr. 892-93, 949.)

C. Expert Testimony Regarding Facsimile Transmission of Forged Order

Cameron Smith, an expert on the Hewlett Packard ("HP") LaserJet 3100 and fax machines generally, testified for the government regarding the facsimile transmission of the forged Order. Smith testified that the Davidson firm fax machine is an HP LaserJet 3100, and that its transmission log for June 17, 2003 indicates that at 11:10 a.m., the machine received a three minute, eighteen second, facsimile transmission from a fax machine that had no identification field to identify the sender at 9600 bits per second ("bps") that completed successfully. (Gov. Ex. 2; Tr. 424-25.) Smith also testified that the length of this transmission is consistent with a facsimile transmission of a four page document, such as the forged Order, sent at 9600 bps. (Tr. 456, 472.)

Smith testified that the call from Reich's home must have sent a fax transmission, because the Davidson firm fax machine automatically terminates calls without a fax signal within 41 seconds. (Tr. 406, 410, 413, 454-55.) He explained that the HP LaserJet 3100 changes the scale of

the images sent to fit on the page. When the HP LaserJet 3100 cannot fit an image on a single page, it prints "Extended Page" on each additional page that the image requires. Thus, if a page is sent to the HP LaserJet 3100 that is 33 inches in length, the HP LaserJet 3100 prints on the first page the page number, "X," on second page "Extended Page X.1," and on third page "Extended Page X.2." (Tr. 457-59.)

Smith testified that at the government's request, he tested the "Extended Page" function by sending facsimile transmissions to the HP LaserJet 3100 of one regular page followed by one 44-inch long page.[1] Based on this testing, Smith determined that if the last three pages of a four page transmission to the HP LaserJet 3100 were attached together (thereby constituting one extra-long page), the HP LaserJet 3100 would print the image in four pages, printing "Page 2" on the second page, "Extended Page 2.1," on the third page and "Extended Page 2.2," on the fourth page, and indicate a two page fax in the transmission log. (Tr. 460-68, Gov. Exs. 75, 76.) Smith testified that the "Extended Page" prints in the forged Order were generated by the HP LaserJet 3100, and that the "P01" on the cover page was not generated by the HP LaserJet 3100. (Tr. 470-71.)

The defense produced Mark Alcock, a forensics expert witness. (Tr. 983-86.) Alcock testified that his examination of the computers seized by the FBI showed that they did not create the forged Order, and that Reich's computer fax

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[1] Smith's tests used two different types of elongated paper: three pages of "tractor feed paper," paper with perforated edges and holes on the sides to accommodate the sprockets on a tractor feed printer, with the perforated edges torn off, and one specially made page 44 inches in length. (Tr. 463.) However, Smith testified that three partially overlapped regular sheets of paper would have had the same result. (*Id.*)

modem could not have sent it. (Tr. 997-99.) He disputed the reliability of Smith's tests of the "Extended Page" function on the HP LaserJet 3100, explaining that after trying twice to send multiple pages that were taped together, he jammed his machine. (Tr. 1000-01.) Alcock also testified that the "Extended Page" function could not have been triggered by a facsimile transmission sent by a fax modem and a flatbed scanner, as Reich alleged to have used in his home to fax. (Tr. 1002-03.) Alcock challenged the authenticity of the Government's exhibits. He asserted that the degraded quality of the header in the forged Order demonstrated that it was never originally sent as a facsimile transmission (Tr. 1023-27), and that the Davidson firm fax machine transmission log could have been replicated on Microsoft Word. (Tr. 1029-31.) Alcock also found plausible Reich's testimony that his fax modem could have "latched" onto the Davidson firm fax machine and prolonged the call after Reich had hung up. (Tr. 1038-39.)

Alcock admitted that he has never used a Canon Fax Phone 8, and that he did not test whether a Canon Fax Phone 8 could have transmitted the forged Order. He confirmed that the service manual states that one model of the Canon Fax Phone 8 faxes at 9600 bps. (Tr. 1001-02, 1039, 1114.) On cross examination, Alcock admitted that he is not an expert in the extended page feature of the HP LaserJet 3100. (Tr. 1069-78.) Alcock further admitted that his conclusion that the forged Order did not originate as a fax was based on assumptions about the magnification and resolution of the copy and the fax header of the copy. (Tr. 1143-49.)

As a rebuttal witness to Alcock, the government produced Yogeshwar Burchell, an expert in the operation of the Canon Fax Phone 8. Burchell testified that the Canon

service manual seized in Reich's home was most likely of the 9600 bps model (Tr. 1214), and that the Canon Fax Phone 8 does not transmit a header. (Tr. 1215-16.)

C. Relevant Pre- and Post-Trial Motions

Before the trial, the Defendant moved *in limine* to prevent the government from introducing the forged Order, arguing that the government had failed to established its authenticity. (*United States v. Reich*, *slip op.*, dated June 10, 2005, at 4.) I ruled that a reasonable juror could find the forged Order to be authentic based on the testimony of Davidson firm employees Weinberg and Vollers, despite the testimony of expert witness Alcock, and denied the Defendant's motion *in limine* to exclude the document pursuant to Federal Rule of Evidence 901(a). (*Id.* at 7.) At trial, the Defendant sought a dismissal of the charges on the basis that Alcock established that the forged Order was not sent as a facsimile transmission from Reich's home to the Davidson firm fax machine. (Tr. 1226-35.) I denied that motion from the bench. (Tr. 1235.)

After deliberations on August 25, 2005, the jury convicted Reich of (1) forgery of a judge's signature in the forged Order; (2) obstruction of justice for his role in interfering with the Ryan Beck lawsuit; and (3) making false representations to FBI agents at the March 3 proffer session.

On September 17, 2005, Defendant moved for a judgment of acquittal or for a new trial pursuant to Federal Rules of Criminal Procedure 29 and 33, based on insufficient evidence, improper impeachment of a character witness, and improper rebuttal. Reich also moved for a post-trial *Franks* hearing. (*See* Def's Mem. Supp. Pre-Trial Mot.) Defendant supplanted this motion on November 30,

2005, withdrawing his Rule 29 bases of improper character impeachment and improper rebuttal, and his application for a post-trial *Franks* hearing, and adding as new grounds for his Rule 33 motion that the uncontradicted portions of Alcock's testimony warrant a new trial. (Def's Ltr. Br., dated Nov. 30, 2005, at 1-7.) Defendant also applied for several changes to the transcript, and for bail pending appeal. (Def's Ltr. Br., dated Nov. 30, 2005, at 7.)

II. STANDARD OF REVIEW

A. Rule 29

The defendant "bears a heavy burden" on a Rule 29 claim as the court "must credit every inference that the jury may have drawn in favor of the government." *United States v. Finley*, 245 F.3d 199, 202-3 (2d Cir. 2001) (internal quotation and citation omitted). "The jury's verdict must be sustained, if *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* (emphasis in original). In reviewing the sufficiency of evidence underlying a conviction, the court is reminded that it is the jury's duty alone to make inferences from the evidence. *See e.g.*, *United States v. Jackson*, 335 F.3d 170, 180 (2d Cir. 2003). Where "either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, the court must let the jury decide the matter." *United States v. Autuori*, 212 F.3d 105, 114 (2d Cir. 2000). In short, as the Second Circuit has put it: "the court may enter a judgment of acquittal only if the evidence that the defendant committed the crime alleged is nonexistent or so meager that no reasonable jury could find guilt beyond a reasonable doubt." *United States v. Guadagna*, 183 F.3d 122, 130 (2d Cir. 1999) (internal quotation and citation omitted).

B. Rule 33

Federal Rule of Criminal Procedure 33 provides that, "[u]pon the defendant's motion the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33. "The ultimate test on a Rule 33 motion is whether letting a guilty verdict stand would be a manifest injustice." *United States v. Ferguson*, 246 F.3d 129, 134 (2d Cir. 1997). The Second Circuit has stated that a district court should exercise such authority only "in the most extraordinary circumstances." *United States v. Locascio*, 6 F.3d 924, 949 (2d Cir.1993). "Although a trial court has broader discretion to grant a new trial pursuant to Rule 33 than to grant a motion for a judgment of acquittal pursuant to Fed. R. Crim. P. 29, where the truth of the prosecution's evidence must be assumed, that discretion should be exercised sparingly." *United States v. Sanchez*, 969 F.2d 1409, 1414 (2d Cir. 1992) (internal citation omitted).

III. DISCUSSION

In this post-trial motion, Defendant argues that a Rule 29 judgment of acquittal is warranted because the evidence adduced at trial was insufficient to convict him on any of the three counts, and that in the alternative this court should grant a new trial pursuant to Rule 33 because the government failed to rebut Alcock's expert opinion that the forged Order was never sent by facsimile transmission to the Davidson firm fax machine, and the verdict is therefore against the weight of the evidence. Both these arguments lack merit.

A. Defendant's Rule 29 Motion for Judgment of Acquittal

Defendant contends that a judgment of acquittal is warranted because there was insufficient evidence to support his convictions. I will proceed to examine all three counts under a Rule 29 sufficiency of the evidence standard.

1. Sending of The Forged Order

Defendant was convicted of having knowingly forged the signature of Magistrate Judge Mann for the purpose of authenticating the forged Order. (Indictment ¶¶ 11-12.) Title 18 of the United States Code makes criminal the "forg[ing of] the signature of any judge . . . of any court of the United States . . . for the purpose of authenticating any proceeding or document . . . ." 18 U.S.C. § 505.

Defendant argues that there was insufficient evidence to support the jury's verdict that Reich sent the forged Order from his home as a facsimile transmission to the Davidson firm fax machine. (Def's Mem. Supp. Post-Trial Mot., at 5-9.) Defendant points to two facts brought out in the trial, *viz*: (1) that Vollers, the secretary of Joel Davidson and the only witness who testified that the forged Order was in the tray of the machine shortly after 11:00 a.m., could not pinpoint when it arrived and did not actually witness the Davidson firm fax machine generate the forged Order (*id.* at 7); and (2) that Alcock, a forensics expect, concluded that the forged Order was never originally a faxed document. (*Id.* at 8.)

The Government provided strong evidence that Reich created and sent the forged Order as a facsimile transmission to the Davidson firm fax machine. The jury heard competent and uncontested evidence that Vollers received

the forged Order from the Davidson firm fax machine tray, and that Reich had placed a phone call from his home to that machine around the time that Vollers discovered the document. Davidson firm staff testified that Reich was the only person who called the Davidson firm fax machine who had sufficient knowledge of the case to be able to create the forged Order.

Although Reich initially denied having called the Davidson firm fax machine and possessing a phone card, Reich later recanted this statement in the face of mounting evidence and admitted that he did place the call using the phone card listed in the Davidson firm fax machine transmission log. At trial, he stated that he had meant to call Joel Davidson's telephone line, and hung up immediately after he realized that he dialed the incorrect number. However, Reich's phone records and the Davidson firm fax machine log showed a several minute communication between Reich and the fax machine, and expert testimony established that the length of this communication was consistent with Reich having sent the forged Order via facsimile transmission. Under the circumstances, a rational juror would have been justified in concluding from Reich's conflicting statements that he was not a credible witness, and could have resolved the conflicting expert opinions against Reich. To the extent that the Defendant seeks to show that he was more credible than Vollers, and that Alcock was more credible than Smith, I must "defer to the jury's assessment of witness credibility and the jury's resolution of conflicting testimony." *United States v. Bala*, 236 F.3d 87, 93-94 (2d Cir. 2000).

Second, the Defendant urges that no rational trier of fact after hearing Alcock's opinion that the forged Order that did not originate as a facsimile could find beyond a rea-

sonable doubt that Reich had sent the forged Order from his home. At trial, Alcock presented to the jury this opinion based on a forensics examination of the forged Order. Alcock concluded that the fax header had degraded in such a way as to indicate that it was never sent by fax, and that the "Extended Page" signals did not appear on the earliest generation of the forged Order received into evidence.[2]

It is axiomatic that a jury is free to accept or reject the opinion of an expert. This is especially true "in forensic document examination, where . . . conclusions are drawn, in large part, on subjective criteria." *United States v. Starzecpyzel*, 880 F. Supp. 1027, 1048 (S.D.N.Y. 1995). On cross examination, Alcock admitted that his conclusion relied on assumptions regarding the magnification and resolution of the copy of the forged Order represented by Government's Exhibit 1. The jury could reasonably have rejected Alcock's opinion that the forged Order was not originally a fax based on these assumptions. Furthermore, the jury was fully justified in rejecting Alcock's opinion that a Canon Fax Phone 8 could not have sent the forged Order in the manner described by Smith, as Alcock admitted that he never operated a Canon Fax Phone 8.

In conclusion, I find that a rational juror could have inferred from the evidence that Reich forged Judge Mann's signature to authenticate the forged Order and faxed it to the Davidson law firm. *See United States v. Canady*, 126 F.3d 352, 356 (2d Cir. 1997) (directing that a court "must affirm the conviction so long as, from the inferences rea-

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[2] Insofar as Reich questions the authenticity of the Government's Exhibit 1 in an attempt to re-litigate its admissibility, I adhere to the ruling in my June 10, 2005 Memorandum and Order. (*See United States v. Reich*, *slip op.*, dated June 10, 2005, at 5-7.)

sonably drawn, the fact finder might fairly have found guilt beyond a reasonable doubt").

2. Obstruction of Justice

Reich argues that no rational juror could have found that Reich sent the forged Order to the Davidson firm to "knowingly, intentionally and corruptly obstruct, influence and impede," the Ryan Beck lawsuit, in violation of 18 U.S.C. § 1512(c)(2). (Indictment ¶ 10.) Section 1512(c)(2) states that a person who "corruptly . . . obstructs . . . any official proceeding, or attempts to do so," violates this criminal provision. 18 U.S.C. § 1512(c)(2).

As a predicate matter, the defense argues that it is the Government's burden to show that the Defendant intended to deceive *the court* in sending the forged Order to the Davidson firm. (*See* Def.'s Mem. Supp. Post-Trial Mot., at 9-11.) Defendant urges that because there was no proof offered that the forged Order deceived any court, that I must overturn the jury's verdict on this obstruction of justice charge.

As a relatively new provision, the few cases that discuss Section 1512(c)(2) do not specifically address the question of whether deception of a litigant in order to interfere with a judicial proceeding constitutes obstruction of justice pursuant to Section 1512(c)(2). *See, e.g.*, *United States v. Alvarez*, 352 F. Supp. 2d 356, 358 (E.D.N.Y. 2005) (finding that an allegation that defendant provided a false declaration to a grand jury to defeat an indictment states a violation of Section 1512(c)(2)); *United States v. Hey*, No. 03-80863, 2005 U.S. Dist. LEXIS 38550, *13-*14 (E.D. Mich. 2005) (denying motions for new trial or acquittal of Section 1512(c)(2) count for offering perjured testimony to a grand jury). However, the Defendant's proposed con-

struction of Section 1512(c)(2) does not comport with the plain meaning of the statute, which is not limited to actions directed at a court. Whether Reich faxed the forged Order directly to the court, or faxed it to opposing counsel, it may still constitute a violation of the statute if sending the forged Order could reasonably be expected to influence a court proceeding.[3] I therefore find that a violation of this statute occurs where, as here, a person acts with the intent to deceive an adverse party with the reasonable expectation that the deception will interfere with a judicial proceeding.

Here, the unrefuted evidence shows that Reich sent the forged Order with the reasonable expectation that it would, and that it did, obstruct the Ryan Beck litigation. Joel Davidson testified that the Davidson firm wasted time and legal expenses in withdrawing and then resubmitting its application for a writ of mandamus, and in discussing the forged Order with Judge Korman and Judge Mann. Judge Mann's law clerk testified that the forged Order wasted judicial resources in requiring Judge Mann to issue an Order and to communicate to Judge Korman and the Second Circuit that the forged Order did not come from her, and to discuss the forged Order at a status conference with the parties. A rational juror could conclude from this evidence that the forged Order obstructed the Ryan Beck lawsuit.

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[3] If Section 1512(c)(2) required an intent to deceive the court, I would find that there was sufficient evidence for a rational juror to conclude that Reich intended in sending the forged Order to deceive the Second Circuit into believing that the writ of mandamus was moot, and that Reich drafted the Davidson law firm as an unwitting agent in the deception.

It can be inferred from the impact of the forged Order on the Ryan Beck lawsuit that Reich intended to obstruct the proceedings. *See United States v. MacPherson*, 424 F.3d 183, 189 (2d Cir. 1997) ("The law . . . recognizes that the *mens rea* elements of knowledge and intent can often be proved through circumstantial evidence and the reasonable inferences drawn therefrom . . . .") Defendant's contention that the "contrived" and "crude construction" of the forged Order belies the Government's contention that it was intended to deceive is without merit. (Def.'s Mem. Supp. Pre-Trial Mot., at 12.) Testimony from employees of the Davidson firm established that the forged Order was not so facially flawed as to be dismissed as a fake instrument. On the contrary, the Davidson firm accepted the document as a true Order, and as a result withdrew its application for a writ of mandamus and contacted the District Judge to expand the reach of the Order to all defendants in the lawsuit.

Defendant's argument that sending the forged Order was not a "corrupt" act because no dishonest purpose can be inferred from the creation and facsimile transmission of the forged Order is also without merit. (Def.'s Mem. Supp. Pre-Trial Mot., at 13.) The question is whether Reich sent the forged Order knowing that the natural outcome of sending it to the Davidson firm would be to obstruct the Ryan Beck litigation. *See United States v. Neiswender*, 590 F.2d 1269, 1274 (4th Cir. 1979) (interpreting similar provision in 18 U.S.C. § 1503 and holding that "[t]he defendant's design is irrelevant: if the natural result of his plan is to interfere with judicial processes, justice will be obstructed whether he hopes it is or not . . . .") The Government put forward sufficient evidence for a jury to conclude that the natural result of sending the forged Order

was to obstruct the Ryan Beck lawsuit. Accordingly, the Government is not required to prove beyond a reasonable doubt the motivation for Reich's deception, whether it was to have Judge Mann recuse herself, to deceive or embarrass a hated adversary, or for future blackmailing purposes. In conclusion, I find that a rational juror could reasonably conclude that the Defendant violated 18 U.S.C. § 1512(c)(2) in sending the forged Order to the Davidson firm with the intent to obstruct the Ryan Beck lawsuit.

3. False Statement to FBI

Lastly, Reich urges this court to find that no rational juror could have concluded from the evidence that he made a willfully false statement to government agents in the March 3 proffer session. (Def.'s Mem. Supp. Pre-Trial Mot., at 13-14.) This obstruction of justice count is grounded in 18 U.S.C. § 1001(a)(2), which states that it is a criminal act for "whoever, in any matter within the jurisdiction of the Government of the United States, knowingly and willfully . . . [to] make[] any materially false, fictitious, or fraudulent statement or representation." *Id.*

Defendant contends that there is a "failure of proof" to show that Reich made a materially false statement at the March 3 proffer session, because agent Katzman's testimony that Reich never admitted to having sent the forged Order suggests that he made no statement at all regarding his culpability. This argument is contrary to the facts. Agent Wilfling testified that at the March 3 proffer session, when Reich was confronted with the allegation that he sent the forged Order during his 11:10 a.m. phone call to the Davidson firm fax machine, Reich stated that he had been trying to reach Joel Davidson but he accidentally dialed the Davidson firm fax machine, and that his tele-

phone sometimes does not disconnect after a call ended. (Tr. 600-01.) At trial, when Reich was asked on direct how he responded in the March 3 proffer session to Agent Katzman's offer not to prosecute in exchange for admitting that he sent the forged Order, Reich testified "No, I told them distinctly no matter what . . . I would never, never say that. I didn't do it. As [I] sit here today, I will never say that I did something I didn't do." (Tr. 896.) A rational juror could have concluded from this testimony that Reich at the March 3 proffer session denied having sent the forged Order to the Davidson firm. Accordingly, Defendant's motion for a judgment of acquittal for this obstruction of justice charge is denied.

For the reasons stated above, Defendant's Rule 29 motion for a judgment of acquittal on the grounds of insufficient evidence is denied.

B. Defendant's Rule 33 Motion for A New Trial

Defendant submits that a new trial is warranted on all counts because Reich's expert witness, Mark Alcock, corroborated Reich's testimony that he "inadvertently" made the phone call to the Davidson law firm, and the Government did not adequately rebut this expert testimony. (Def.'s Ltr. Br., dated Nov. 30, 2005, at 5.) Reich's Rule 33 motion is based on Alcock's purportedly "uncontradicted testimony" that (1) the forged Order was not created on the seized computers; (2) Reich's fax modem did not send the forged Order; (3) Defendant could not have created the subject fax by taping pages together or using tractor paper; (4) Government's Exhibit 1 never was a fax; and (5) "when Defendant connected to the Davidson firm fax machine, his computer modem 'latched' onto the Davidson machine after Defendant hung up, until it timed out." (*Id.*)

As stated *supra*, Alcock's testimony that Government Exhibit 1 was never a fax and could not have been sent via facsimile transmission was indeed contradicted by expert testimony and by other evidence adduced at trial. The Government's expert witness, Cameron Smith provided lengthy testimony that the forged Order and transmission log are consistent with the use of a fax machine, such as the Canon Fax Phone 8, to send a fax at 9600 bps to the HP LaserJet 3100 in which the second page was three pages long. Furthermore, Defendant's contention that it was "uncontradicted" that Reich could not have taped the last three pages together or used tractor paper to fax the forged Order is contrary to the facts. By Alcock's own admissions, he only made two attempts to send a fax with the last three pages taped together, he never attempted to send a fax with tractor paper, and he did not test the capability of the Canon Fax Phone 8 to fax attached pages. (Tr. 1000-02.) In contrast, Smith's uncontested testimony was that the forged Order could have been sent as a three page attached document using tractor paper. (Tr. 463.)

Alcock's opinion that Defendant's fax modem 'latched' onto the Davidson machine after he disconnected the call is contradicted by Smith's uncontested testimony that the Davidson firm fax machine times out after 41 seconds. Alcock's 'latching' theory does not on its face explain why the fax log records would reflect a call lasting several minutes if the Davidson firm fax machine is designed to terminate calls after 41 seconds. Although Alcock at trial dismissed this contradiction by positing, essentially, that anything is possible when a fax modem malfunctions, he also admitted that it was possible that there was no malfunction and that Reich sent a fax. (Tr. at 1178-1180.) Under the circumstances, the jury was justified in crediting

Smith's opinion that the fax modem could not have 'latched' onto the call because the HP LaserJet 3100 would have terminated the call after 41 seconds.

With respect to the remainder of Alcock's testimony, specifically that the forged Order was not created on the seized computers and that Reich's fax modem did not send the forged Order, the Government was not required to prove these facts. Inasmuch as Defendant argues that a new trial is necessary because Defendant offered expert testimony tending to disprove two subsidiary facts of a possible means by which Reich sent the forged Order, this argument lacks merit because "[t]he burden does not operate upon each of the many subsidiary facts upon which the prosecution may collectively rely to persuade the jury that a particular element has been established beyond a reasonable doubt." *United States v. Viafara-Rodriguez*, 729 F.2d 912, 913 (2d Cir. 1984). Therefore, the question before this court is whether the weight of the evidence supports beyond a reasonable doubt the allegation that Reich faxed the forged Order to the Davidson firm.

Assuming, *arguendo*, that Alcock's testimony showed that the forged Order was not created on Reich's seized computers or sent using Reich's seized fax modem, the weight of the evidence supports the inference that Reich was otherwise capable of creating and faxing the forged Order from his home. Reich could have converted the June 3, 2003 Order into the forged Order on a typewriter using manual instruments, or on a different computer not seized by the Government. Defendant could have sent the forged Order with the Canon Fax Phone 8 that he admitted to owning at one time, or some other fax machine that the Government did not seize. The testimony of the Davidson firm employees that they received the forged Order at the

same time that Reich called the fax machine and that Reich was the only person to have called that day who could have created the forged Order was credible. Alcock did not in his testimony create a reasonable doubt as to Reich's ability to send the forged Order. Accordingly, the weight of the evidence supports the jury's conclusion that the Defendant sent the forged Order via fax to the Davidson firm fax machine.

The decisional law relied on by Reich in support of his motion supports this conclusion. In *Sanchez*, the Second Circuit reversed a district court that granted a Rule 33 motion because the trial judge erroneously rejected the testimony of three police officers because of "insignificant" discrepancies in their testimony. *United States v. Sanchez*, 969 F.2d 1409, 1414 (2d Cir. 1992). In *Ferguson*, the Second Circuit upheld a new trial order by the district court in a trial for conspiracy to commit murder in aid of racketeering, on the basis that the prosecution failed to provide any evidence showing the necessary motive element that the act was for pecuniary gain or for gang membership or status. *United States v. Ferguson*, 246 F.3d 129, 135-136 (2d Cir. 2001). *See also United States v. Morales*, 902 F.2d 604, (7th Cir. 1990) (Posner, J.) (granting a new trial because of the discrepancies in the only witness's testimony and aspects of the physical evidence, and the harsh minimum sentence for conviction).

As in *Sanchez*, this is not a case in which "testimony is patently incredible or defies physical realities . . . ." *Sanchez*, 969 F.2d at 1414. The Government presented competent and admissible evidence demonstrating that Reich had the capacity to fax the forged Order from his home. Unlike *Ferguson*, in which there was no proof to support an element of the charged offense, whether Reich created and

sent the forged Order via his scanner and fax modem are subsidiary facts that are unnecessary for the jury to find that Reich created and sent the forged Order beyond a reasonable doubt.

In conclusion, this court finds that the weight of the evidence supports the conclusion that Reich faxed the forged Order to the Davidson firm fax machine, and Reich's motion is therefore denied.

C. Continuation of Bail Pending Appeal

The defense moves for bail pending appeal pursuant to 18 U.S.C. § 3143(b)(1), which provides that:

> a judicial officer shall order that a person who has been found guilty of an offense and sentenced to a term of imprisonment, and who has filed an appeal or a petition for a writ of certiorari, be detained, unless the judicial officer finds . . . by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released . . . and . . . that the appeal is not for the purpose of delay and raises a substantial question of law or fact likely to result in . . . .

reversal, a new trial, or a sentence that does not include imprisonment on all counts. *Id.* Therefore, in order to grant Defendant's motion for bail pending appeal, I must find that (1) Reich is not likely to flee or pose a danger to the safety or any other person or the community; (2) his appeal is not for the purposes of delay; (3) the appeal raises a substantial question of law or fact; and (4) that if the Second Circuit decides the appeal in a manner favorable to Reich, whether that decision is likely to result in a reversal or a

new trial on all counts. *See United States v. Randell*, 761 F.2d 122, 125 (2d Cir. 1985)

With respect to the first element, Reich is unlikely to flee or pose a danger to any person or the community. The Government does not dispute this. I did not find Reich to be a flight risk or a danger to the community before trial, and I decline to do so now. See *United States v. DiSomma*, 951 F.2d 494, 497 (2d Cir. 1991) ("trial judge's close familiarity with the evidence presented in the case" affords discretion to trial judge in determining whether the defendant poses a danger to the community).

The second and the third elements of this analysis are interrelated, because whether or not an appeal is made to delay the sentence depends in large part on whether any substantial appeal questions are presented. The Second Circuit defines a "substantial" question as "one of more substance than would be necessary to a finding that it was not frivolous. It is a 'close' question or one that very well could be decided the other way." *United States v. Randell*, 761 F.2d 122, 124 (2d Cir. 1985) (internal quotation omitted) (finding this articulation of a "substantial" question to be the most appropriate).

In viewing the totality of the evidence, Defendant in his post-trial motions has not raised any close questions for appeal.[4] The Government provided strong evidence on all three counts for which Reich was convicted, and any con-

[4] The only potentially open question, whether 18 U.S.C. § 1512(c)(2) requires a showing of deception of the court, does not present a substantial question on appeal because there was sufficient evidence for the jury to conclude that Reich in sending the forged Order intended to deceive the Second Circuit. Moreover, as this question implicates only one of the three counts of which Reich was convicted, it does not provide a basis for bail pending appeal.

clusions of guilt that required an inference are well within the boundaries of permissible inferences set forth by the Second Circuit. Further, while the standard for a Rule 33 motion for a new trial is lower, a trial court is given discretion in deciding whether to grant a Rule 33 motion. *See United States v. Ferguson*, 246 F.3d 129, 133 (2d Cir. 1997) (reviewing a district court's ruling on a Rule 33 motion for abuse of discretion, and finding that "the district court's holding is not an abuse of discretion even though we may have decided differently if we were the trial judge"). As a result, I find that the Rule 29 and Rule 33 motions presented to me do not pose close questions for appeal purposes.

Defendant in his response to the Government's opposition to bail pending appeal submits that his withdrawn motions should be considered in deciding whether his appeal raises any substantial questions of law or fact. (Def's Ltr. Br., dated Jan. 10, 2006, at 2-3.) In particular, Defendant contends that his withdrawn Rule 29 motion based on the Government's impeachment of Reich's character during the cross-examination of a character witness presents a substantial question of law. (*Id.*) As Defendant has previously raised this objection, and Defendant submitted briefing on the issue before withdrawing it, I shall now consider this ruling strictly for the purposes of whether it raises a substantial question of law or fact.[5]

Defendant's Rule 29 motion based on improper impeachment of Reich's character argues that the Government

[5] I shall not, however, delve into unarticulated "numerous other issues which had been litigated prior to, and during the course of the trial," (Def's Ltr. Br., dated Jan. 10, 2006, at 3) as it is Defendant's burden to overcome the presumption of post-trial detention pending appeal. *See Randell*, 761 F.2d at 124-25.

improperly cross-examined James Pelzer, a character witness for Reich. Pelzer testified on direct examination that Reich is "a person of high honesty and integrity, a person that you can trust . . . and . . . others share that same opinion. (Tr. 813.) On cross-examination, the Government sought to attack Reich's character by asking about an unauthorized change in his law partner's life insurance policy in violation of the partnership agreement. (Tr. 817.) At a hearing, I examined a partnership agreement between the partner and Reich, in which each had life insurance paid by Reich, the proceeds of which went to their own families in the event of their death. (Tr. 822.) The agreement stated that if Reich sought to change the terms of the agreement, that he would have to notify his partner. (Tr. 823.) Lastly, I examined correspondence that established that Reich changed the terms of the agreement after the partner was diagnosed with cancer without consulting the partner. (Tr. 823-25.) Based on that proffer, I allowed the following question over defense counsel's objection:

> Mr. Pelzer, if I told you that Mr. Reich had changed the beneficiary of an insurance policy away from Mr. Schapiro's family members, designating the law firm the beneficiary in the event of Mr. Schapiro's death, without notice to Mr. Schapiro and in violation of the partnership agreement that the two of them had, would that change your opinion or the opinion of the community . . . with regard to the defendant's honesty or good character?

(Tr. 847.)

"Once a defendant offers character testimony, the prosecution is afforded substantial latitude to rebut such evi-

dence." *United States v. Russo*, 110 F.3d 948, 952 (2d Cir. 1997). Federal Rule of Evidence 405 provides that if the defense puts forward a character witness to testify to the defendant's good reputation, that "[o]n cross-examination, inquiry is allowable into relevant instances of conduct." F.R.E. 405(a). The cross-examination is permitted to evaluate the character witness's credibility and knowledge of the defendant. *United States v. Birney*, 686 F.2d 102, 108 (2d Cir. 1982). Before allowing the prosecution to attack a defendant's credibility by asking character witnesses on cross-examination about a specific instance of conduct, the trial court should ascertain that the prosecution has a good faith belief that the act occurred, and that the incident is relevant to the character trait at issue. *Michelson v. United States*, 335 U.S. 469, 481 n.18 (1948). The Second Circuit reviews "a trial court's ruling on the admissibility of character evidence for an abuse of discretion." *United States v. Damblu*, 134 F.3d 490, 494 (2d Cir. 1998); *see also Michelson v. United States*, 335 U.S. 469, 480 (1948).

With these principles in mind, there is no substantial question presented as to whether this question was permissible under Federal Rule of Evidence 405. The defense counsel offered a character witness who testified to Reich's reputation for honesty and integrity in the New York legal community. On cross-examination, the prosecution is entitled to ask the witness about an act, based upon a good faith basis to believe that the act occurred, that tended to show Reich's character for dishonesty. Further, Reich's propensity for integrity and honesty was relevant to the charges that he would seek to deceive an adversary's counsel and obstruct a judicial proceeding through the use of a forged Order.

Defendant argues that the insurance agreement was a "private" issue that was not intended to test the witness's knowledge of Reich, but simply to prejudice him in the eyes of the jury. (Def. Mem. Supp. Pre-Trial Mot., at 16-22.) Defendant relies on *United States v. Monteleone*, 77 F.3d 1086, 1089 (8th Cir. 1996), in which the Eighth Circuit held that the prosecutor must have a good faith belief that the incident is "likely to have become a matter of general knowledge, currency or reputation in the community." *Id.* (quoting *United States v. Duke*, 492 F.2d 693, 696 (5th Cir. 1974)). The Eighth Circuit reversed a conviction for improper character impeachment because the prosecution asked a character witness about the defendant's alleged perjury as a witness in a grand jury proceeding. *Id.* at 1090. Because of the judicially mandated secrecy surrounding grand jury proceedings, the court found that it was "patently unlikely" that the public would be aware of the alleged perjury. *Id.*; *see also Duke*, 492 F.2d at 696 (private nature of alleged bad act demonstrated by the fact that the prosecutor learned of the incident through grand jury testimony).

The private nature of the grand jury proceeding in *Monteleone* is distinguishable from the instant violation of the partnership agreement. The prosecution offered a letter from Reich's partner's family regarding the violation of the partnership agreement, which, unlike the grand jury in *Monteleone*, was not legally bound to secrecy. Furthermore, the question by the prosecution to test Mr. Pelzer's knowledge of Reich's reputation for honesty and integrity in the New York legal community involved a violated agreement between partners in a New York law firm, the precise community that was likely to know about this incident. Defendant's characterization of the private nature of

the law partnership is belied by Pelzer's own testimony, in which he admitted having known that Reich practiced with the law partner and that the partner had recently died. (Tr. at 817.) Furthermore, in contrast to *Monteleone* where the grand jury statement at issue was never shown to be perjurious, *Monteleone*, 77 F.3d at 1090, there is no dispute that Reich changed the policy without his law partner's consent in violation of the partnership documents. (*See* Tr. at 825-26.) In short, the substance of the Government's Rule 405 question does not approach the type of conduct considered private by the Eighth Circuit in *Monteleone*.[6]

Whether the Prosecution was entitled to question Pelzer about Reich's change to his law partner's life insurance policy under Federal Rule of Evidence 405, after this court determined that there was a good faith basis for the question and that it was relevant to the charged offenses, does not present a close question. Moreover, even if this ruling were incorrect, it would be harmless error, as there was strong evidence as to Reich's guilt. Accordingly, there is no substantial question raised for appeal purposes by this court's decision to permit the Prosecution to question Pelzer about Reich's violation of the partnership agreement.

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[6] Defendant further argues that this question should not have been permitted because of its prejudicial nature. (Def.'s Mem. Supp. Pre-Trial Mot., at 22.) Balancing relevancy against prejudice is governed by Federal Rule of Evidence 403, which states that the trial court may exclude evidence if it "is substantially outweighed by the danger of unfair prejudice." F.R.E. 403. I find that the question did not cause unfair prejudice, but rather legitimately probed the character witness's knowledge of Reich. As Rule 403 provides discretion to the trial judge, and I found that its probative value outweighed the likelihood of unfair prejudice, this does not present a substantial question on appeal.

I will briefly address the remaining arguments that Defendant has raised for appeal. Reich's argument that the search warrant of his home was issued based on false information does not raise a substantial question because even if true, the warrant was supported by probable cause after excising the allegedly false information. *See United States v. Canfield*, 212 F.3d 713, 718 (2d Cir. 2000) (finding that remaining portions of an affidavit with false information supported probable cause). Furthermore, Reich's argument that the Government's summation was improper in light of my rulings limiting his cross-examination fails because "[t]he scope and extent of cross-examination are generally within the sound discretion of the trial court." *United States v. Weiss*, 930 F.2d 185, 197 (2d Cir. 1991). Assuming, *arguendo*, that any of these rulings were improper, they were harmless error, as the purported improper comments did not substantially influence the jury in light of the strong evidence presented by the Government showing Reich's culpability for the charges of which he was convicted. *See United States v. Pedroza*, 750 F.2d 187, 197 (2d Cir. 1984) (citing *Kotteakos v. United States*, 328 U.S. 750, 764-65 (1946)).

In conclusion, as Defendant raises no substantial questions of law or fact, I find that Reich's appeal would simply be for the purposes of delay. As a result, I need not reach the question of whether these questions, if successful, would have the effect of overturning or ordering a new trial of all charges. Therefore, Reich's motion for bail pending appeal is denied.

D. Changes To The Transcript

Lastly, Reich moves for a number of changes to the trial transcript. Reich's motion is governed by Federal Rule of Appellate Procedure 10(e), which provides that this court "has the power to resolve a dispute over the record in the first instance." *United States v. Zichettello*, 208 F.3d 72, 93 (2d Cir. 2000) (interpreting Fed. R. App. P. 10(e)). The district court reconstructs the record at its discretion unless the record "'was intentionally falsified or plainly unreasonable.'" *Id.* (quoting *United States v. Keskey*, 863 F.2d 474, 478 (7th Cir. 1988)).

On page 817, lines 17 - 20, the Government asks Pelzer: "Would it change your opinion of Mr. Reich or would it change, in your opinion, would it change the community's view of Mr. Reich if you learned about Mr. Reich's changing the beneficiaries of an insurance policy of Mr. Schapiro?" (Tr. 817.) Mr. Mahler, Reich's former defense counsel who was present when the question was asked, posits that the reporter failed to capture the following words at the end of that sentence: "from Mr. Schapiro's children to himself, in violation of a partnership agreement, the day after he learned that Mr. Schapiro had terminal cancer." (Decl. of Stephen Mahler ¶ 19.) The Government states that it did not reference "terminal cancer in front of the jury nor did the government at that time refer to Mr. Schapiro's children or that they were young . . . ." (Gov't Mem. Opp. Post-Trial Mot., at 31 n.13.)

My review of the transcript shows that the Government in its cross-examination of Pelzer never mentioned that Schapiro had terminal cancer or that he had children. This is supported by events subsequent to the initial question. During this cross-examination, there was a lengthy discussion outside the presence of the jury about whether this

question was permissible, and if so, in what form, and I took the precaution of instructing the prosecutor that "you are not to discuss cancer in asking the question . . . ." (Tr. 839). The prosecutor's ultimately permitted question did not mention cancer, Schapiro's death, or his children. (Tr. 847.) The record appearing correct as stated, I deny Defendant's motion to change this portion of the transcript.

Regarding this court's statement on page 831, my recollection is, and I direct that the transcript be modified to reflect from line 2 on page 831 the following: "Katz. The person who knows best what happened with the insurance policy is sitting in the courtroom."

As there is no objection to any of the other modifications to the transcript, I direct that the transcript be modified in the following manner: "Vuscone V-U-S-C-O-N-E" changed to "Biscone B-I-S-C-O-N-E" on page 823, line 19; "DeBono" changed to "Bodenmiller" on page 824, line 5; and "firearms" changed to "telephones" on page 986, line 14.

IV. Conclusion

Having considered thoroughly the entire case and Defendant's specific arguments, the court concludes that the guilty verdict rendered by the jury was amply supported by competent, satisfactory and sufficient evidence properly admitted in the course of a fair trial, and that Defendant raises no substantial questions on appeal. Accordingly, the Defendant's motions for a judgment of acquittal pursuant to Rule 29 of the Fed. R. Crim. Pro. and for a new trial pursuant to Rule 33 of the Fed. R. Crim. Pro., and his application for bail pending appeal are hereby DENIED. Defendant's motion to modify the transcript pur-

suant to Rule 10(e) of the Federal Rules of Appellate Procedure is GRANTED in part and DENIED in part.

SO ORDERED.

Dated: March 10, 2006
Brooklyn, NY

/s/ Nicholas G. Garaufis
Nicholas G. Garaufis
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

02-CV-4052 (RLM)
Filed: June 23, 2003

RYAN, BECK & CO., LLC,

Plaintiff,

—against—

YOUSSEF FAKIH, et al.,

Defendants.

MEMORANDUM AND ORDER

ROANNE L. MANN, UNITED STATES MAGISTRATE JUDGE:

Plaintiff Ryan, Beck & Co., LLC ("plaintiff" or "Ryan Beck") filed this action against defendants Perry S. Reich ("Reich"), Franka Jones, as trustee of the Franka Jones Trust ("Jones"), and Youssef and Ali Fakih ("the Fakihs") (collectively referred to herein as "the investors" or "defendants"), seeking the following relief: a declaratory judgment that Ryan Beck has no obligation to arbitrate certain disputes with the investors; a stay of three pending arbitrations brought by the investors against Ryan Beck; and a declaratory judgment absolving Ryan Beck of liability for the acts that are the subject of those arbitrations. *See generally* Complaint ("Compl.") at ¶¶8, 10-20 and *ad damnum clause.*

Currently before this Court, following the parties' consent to have a magistrate judge handle the case for all purposes (*see* 28 U.S.C. § 636(c)(1)), are various dispositive motions and cross-motions filed by Ryan Beck, Jones and the Fakihs.[1] Specifically, Ryan Beck has moved for summary judgment on its second claim for declaratory relief (*i.e.*, adjudging the parties' disputes non-arbitrable) and demands a permanent stay of each of the arbitrations pending against it. All three groups of investors[2] have filed papers opposing Ryan Beck's motions,[3] and Jones and the Fakihs have cross-moved to compel arbitration.[4]

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[1] Ryan Beck's motion for sanctions against Reich, and Reich's cross-motion for sanctions against Ryan Beck, were denied from the bench during oral argument on January 21, 2003. *See* Transcript of Proceedings on January 21, 2003 ("1/21/03 Tr.") at 15. (All transcripts of court proceedings are cited herein as "[date] Tr.")

[2] For ease of reference, the Fakihs hereinafter will be referred to as one investor.

[3] Because the parties have filed numerous briefs and affidavits, references to the parties' submissions will, in order to avoid confusion, include the document number ["# "] as reflected on the docket sheet.

[4] Although all three investors have signed onto the Defendants' Joint Memorandum of Law in Support of Their Cross-Motion to Compel Plaintiff to Submit to Arbitration and in Opposition to Plaintiff's Motion ("Def. Joint Mem." [#99]), Reich has not filed any notice of cross-motion. For the reasons detailed in this opinion, Reich's situation is materially distinguishable from that of his co-defendants and, had he cross-moved for declaratory relief and/or to compel arbitration, this Court would have denied the motion.

The Fakihs' Notice of Cross-Motion (#94) seeks "an order declaring that the plaintiff must arbitrate" its dispute with them. No party has addressed the distinction between an order declaring a duty to arbitrate versus an order compelling arbitration and thus, for purposes of this opinion, the Court will treat those concepts interchangeably.

For the reasons that follow, the Court denies Ryan Beck's motions in all respects and grants in part the cross-motions of the Fakihs and Jones, directing Ryan Beck to arbitrate the issue of arbitrability with respect to those investors. Reich's arbitration proceeding is hereby stayed pending the outcome of this lawsuit.

FACTUAL BACKGROUND[5]

Several years ago, each of the investors opened an account with Gruntal & Co., L.L.C. ("Gruntal"),[6] which was then registered with the Securities and Exchange Commission as a broker-dealer and was a member of the New York Stock Exchange ("NYSE") and the National Association of Securities Dealers ("NASD"). Upon becoming a client of Gruntal, each investor entered into a form contract entitled "Client Agreement & Margin Agreement" (hereinafter "Client Agreement"). *See, e.g.*, Court Exhibit ("CX") 2; CX 3; 9/5/02 Tr. at 5-6.[7] Each such

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[5] Unless otherwise indicated, the facts recounted are not in dispute.

[6] The Fakihs opened a joint account. Reich transferred his funds from another brokerage firm. *See* Deposition of Perry S. Reich, on October 30, 2002 ("Reich Dep."), attached as Exhibit ("Ex.") A to Plaintiff's Supplemental Brief in Support of Its Motion for Summary Judgment Against Defendant Perry Reich ("Pl. Supp. Br." [#90]) at 6, 15-16. (Reich also opened a second account with his mother, but that account is not at issue in this action or in Reich's pending arbitration. *See* Reich Dep. at 24-25.)

[7] The Jones and Fakih Client Agreements were marked as court exhibits at oral argument on Ryan Beck's motion for a preliminary injunction. (Although the proceeding was held on September 4, 2002, the transcript is incorrectly dated September 5, 2002, and is therefore cited as "9/5/02 Tr.") Copies of the Jones and Fakih Client Agreements are also appended to the submissions of their respective counsel. *See*

Client Agreement included a broadly worded arbitration provision, *see, e.g.*, CX 2 and 3 at ¶16,[8] and provided that the Client Agreement would "inure to the benefit of and be binding upon" the parties to the Client Agreement and, among others, their respective successors and assigns. *See id.* at ¶17; PX 2A (#90 [Ex.A]), Client Agreement at ¶1.[9]

Exhibit B to Affidavit [of Edward H. Glenn, Jr.] in Support of Cross-Motion to Submit to Arbitration ("Glenn Aff." [#89]); Exhibit A to Defendant Fakih's [sic] Response to Local 56.1 Statement ("Fakih 56.1 Stmt." [#94]).

The Reich Client Agreement was included among the documents marked as Plaintiff's Exhibit 2A ("PX 2A") at Reich's deposition (appended to Pl. Supp. Br. [#90]). Although the new account form attached to the Client Agreement was signed by a Gruntal account executive and approved by a Gruntal manager, the Court's copies of the form and Client Agreement do not appear to have been signed by Reich. Inasmuch as no party has focused on the absence of Reich's signature, the Court will assume that the Client Agreement reproduced within PX 2A was the operative agreement between Gruntal and Reich.

[8] The Jones and Fakih Client Agreements provide in pertinent part that the parties thereto "agree that all disputes that may arise between or among [those parties and certain specified other parties], arising out of or relating to [that investor's] Accounts (except for regulated commodity accounts), orders, transactions or any construction, performance or breach of this or any other agreement between or among [the parties thereto] will be settled by arbitration." CX 2 and 3 at ¶16.

[9] The language of the Client Agreement as to Reich differs from that of the Fakihs and Jones in respects not material to the issues in this case. The Reich Client Agreement provides, among other things, that "[a]ny dispute I now or hereafter may have with Gruntal or any of its current or former officers, directors, agents and/or employees, arising out of or relating to any of my accounts with Gruntal or to transactions heretofore or hereafter made therein or to any agreement between myself and Gruntal, shall be settled by arbitration." PX 2A (#90

In March 2001, Reich notified Gruntal, in writing, that he had "made arrangements to move [his] accounts to another brokerage firm," and he directed Gruntal "not to make any further transactions with respect to this account." Letter from Perry S. Reich to Joseph Burgos, dated March 16, 2001, included in PX 2A and PX 4 (#90 [Ex.A]). The next day, in a follow-up letter to a Gruntal supervisor, Reich complained that his account manager had not "follow[ed his] directions," and he accused the account manager of seeking "to increase his personal commissions at [Reich's] continued expense." Letter from Perry S. Reich to Mark Serby, dated March 17, 2001, included in PX 4 (#90 [Ex.A]). Reich transferred all of the assets in his Gruntal accounts to Quick & Reilly on or about April 9, 2001. *See* Reich Dep. (#90 [Ex.A]) at 31-32. The accounts of the other defendants remained open in and after the end of April 2002. *See* 9/5/02 Tr. at 11; 1/21/03 Tr. at 21; *see also id.* at 48.

In June 2001, Reich initiated an arbitration proceeding before the NASD against Gruntal and its agent, Joseph Burgos, charging that his account had been mishandled. In April 2002, the Fakihs and Jones commenced similar arbitration proceedings against Gruntal and its agents: the Fakihs brought their claims before the NASD and Jones brought hers before the NYSE.

Later that month, on or about April 20, 2002, Ryan Beck, a broker-dealer headquartered in Livingston, New Jersey, entered into a series of interrelated agreements, including an amended asset acquisition agreement

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[Ex.A]). Client Agreement at ¶ 14. Like the Jones and Fakih Client Agreements, Reich's Agreement further provides that it "shall inure to the benefit of and be binding upon you and me and our respective . . . successors and assigns." *Id.* at ¶ 1.

("Acquisition Agreement"), with Gruntal, its parent company Gruntal Financial, L.L.C., and Gruntal Facilities Management, L.L.C.[10] Pursuant to the Acquisition Agreement, Ryan Beck agreed to purchase most of the assets of Gruntal, including customer accounts and related books and records. The nature and effect of the transaction—that is, whether it constituted a *de facto* merger or rendered Ryan Beck a successor-in-interest to Gruntal's liabilities—are the subject of much controversy among the parties, as is the adequacy of the purchase price paid by Ryan Beck. Part of the debate centers on a provision in the Acquisition Agreement, pursuant to which the parties to that contract agreed that, with certain exceptions not relevant here, Ryan Beck would not assume any of Gruntal's liabilities or obligations other than those arising as of the closing date, April 26, 2002 ("the Closing Date"). *See* Acquisition Agreement § 1(B)(2) (stating, *inter alia,* that Ryan Beck "will not assume . . . liabilities for litigation, arbitrations or other claims relating to operations prior to the Closing Date [April 26, 2002], whether instituted before or after the Closing Date . . . .").

On the Closing Date, the defendants and other investors were sent form letters on Gruntal letterhead, signed by the chairmen and chief executive officers of Gruntal and Ryan Beck, respectively. Following the salutation "Dear Valued Client," each letter advised that Ryan Beck had acquired certain assets and liabilities of Gruntal; that the investor's account would be transferred to Ryan Beck, effective April 29, 2002, unless the investor immediately notified his or her account executive otherwise and made arrangements

[10] The Acquisition Agreement and related documents are attached as Exhibit A to the Affidavit of Robert M. Berson In Support of Plaintiff Ryan, Beck's Motion for Summary Judgment ("Berson Aff." [#55]).

for the account and/or securities to be transferred elsewhere; and that the account would be serviced at Ryan Beck by the same account executive as at Gruntal.[11] It is undisputed that none of the defendants signed a new client agreement with Ryan Beck. *See*, *e.g.*, 9/5/02 Tr. at 15. However, plaintiff acknowledges that the Gruntal Client Agreements with Jones and the Fakihs became the operative contracts with those customers. *See* 9/5/02 Tr. at 15-16, 25, 71-73; 10/11/02 Tr. at 19, 44-45; 1/21/03 Tr. at 21-23, 33, 48.

Within several months of Ryan Beck's acquisition of Gruntal's accounts and other assets, each of the investor-defendants amended his or her statement of claim in arbitration to add Ryan Beck as a respondent.[12] On June 25, 2002, Ryan Beck filed its answer to the Fakihs' arbitration claims, requesting their dismissal. The underlying arbitration proceedings have continued, subject to a stipulation by the defendants that they "will not assert or argue that further participation of Ryan, Beck & Co., L.L.C. in the [respective] arbitration proceeding[s] . . . constitutes a waiver by Ryan, Beck & Co., L.L.C. of any rights it may have to contest the propriety of its inclusion in such arbitration proceeding[s]." Stipulation & Agreement of the Defen-

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[11] A sample of the form letter—hereinafter referred to as the "Dear Client Letter"—is attached as Exhibit A to the Glenn Affidavit (#89).

[12] Ryan Beck is a member of the NASD but, unlike Gruntal, is not a member of the NYSE. Plaintiff's complaint includes a cause of action seeking to stay the Jones arbitration proceeding on the ground that the NYSE "has no jurisdiction" over Ryan Beck. Compt. at ¶ 19. In order to simplify the issues before this Court, Jones agreed to and, in October 2002, did in fact refile her arbitration claims against Ryan Beck (which had been pending before the NYSE) with the NASD. *See* Stipulation of Defendant [Jones], dated September 18, 2002 (#51); 9/5/02 Tr. at 105-07; 10/11/02 Tr. at 30; 1/21/03 Tr. at 72.

dants, dated September 18, 2002 (#51); *see* 9/5/02 Tr. at 100-05.[13]

On July 17, 2002, Ryan Beck commenced this federal action with the filing of its complaint for declaratory and injunctive relief. On July 25, 2002, Ryan Beck sought a temporary restraining order, which was denied by the Honorable Edward R. Korman, who referred plaintiff's motion for a preliminary injunction to this magistrate judge.[14] After the motion was fully briefed and argued, and after the case was, with the parties' consent, reassigned to a magistrate judge for all purposes, this Court issued a Memorandum and Order on September 20, 2002, denying the motion for a preliminary injunction. *See* Memorandum & Order, dated September 20, 2002 ("9/20/02 M&O").[15] On October 11, 2002, the Court denied from the bench a cross-motion filed by the Fakihs to dismiss the action on the ground that Ryan Beck had waived its objection to arbitrability. *See* 10/11/02 Tr. at 4-7. The Court then ordered discovery limited to the issue of Reich's status as a customer of Ryan Beck (*see id.* at 54-57, 60-61) and established a briefing schedule on the cross-motions for summary judgment.

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[13] The Jones arbitration hearing has been scheduled for January 2004; the Fakihs' arbitration hearing is scheduled for February and March 2004; the Reich hearing has not been set. *See* Letter to the Court dated April 11, 2003, from Joel E. Davidson, Esq. (#75); Letter to the Court dated June 12, 2003, from Stuart D. Meissner, Esq. (#109).

[14] Plaintiff at the same time moved for summary judgment, but this Court concluded that the motion was premature. *See infra* note 38.

[15] Plaintiff recently moved for reconsideration of the ruling as to the Fakihs, and the Court adhered to its decision. *See* Memorandum and Order dated June 3, 2003.

Gruntal filed for bankruptcy protection on October 30, 2002, in *In re GCO Services LLC*, No. 02-15360 (S.D.N.Y. Bankr.). *See* Berson Aff. (#55) at ¶2.

DISCUSSION

I. The Parties' Positions

The investors advance a series of arguments as to why Ryan Beck is obligated to arbitrate the disputes at issue. Looking first to traditional principles of contract and agency, the investors assert that, as plaintiff's customers, their relationships with Ryan Beck were governed by the Gruntal Client Agreements, each of which included an arbitration provision; therefore, they argue, Ryan Beck assumed the obligation to arbitrate the parties' disputes and, having derived the benefits of that contractual relationship, plaintiff is estopped from denying its duty to arbitrate. *See* Def. Joint Mem. (#99) at 4-8. Secondly, the investors contend that, apart from the aforesaid contractual right to arbitration, NASD rules compel member firms to arbitrate disputes with their customers. *See id.* at 8-13. Moreover, they claim, the scope of the arbitration clause in the Client Agreement is a matter for the arbitrators to decide. *See id.* at 13-14.

Plaintiff resists arbitration on a number of grounds. Relying principally on the disclaimer of liability contained in the Acquisition Agreement, Ryan Beck maintains that it did not agree to arbitrate "antecedent Gruntal disputes"[16]

[16] Plaintiff's Reply Memorandum of Law in Support of Its Motion For Summary Judgment/Declaratory Judgment ("Pl. Reply" [#103]) at 2.

or "disputes relating to successor liability."[17] According to plaintiff, its arbitration agreement with former Gruntal customers did not encompass "the subject matter of the [pending] arbitrations." Pl. Mem. (#87) at 3. Plaintiff also disputes the investors' claim that the arbitrators should decide the scope of the arbitration provision; in plaintiff's view, the "plain meaning" of the Acquisition Agreement "reflects [plaintiff's] intent not to arbitrate . . . ." Pl. Reply (#103) at 3.

Concerning the duty to arbitrate imposed by the NASD Code, plaintiff takes the position that "customer" status must be determined as of the time of the alleged wrongdoing; in this case, the investors were Gruntal customers when their claims arose. *See* Pl. Mem. (#87) at 4-6; Pl. Reply (#103) at 8.

As to Reich, plaintiff alleges that he never became a customer of Ryan Beck, as he closed his Gruntal accounts and transferred his assets one year prior to the acquisition, *see generally* Pl. Supp. Br. (#90); consequently, Reich "totally failed to prove that he has any agreement to arbitrate" with Ryan Beck. *Id.* at 11.

Finally, Reich maintains that he "must be deemed to have been a 'customer' of Ryan, Beck," because he received a "Dear Client Letter" advising him of the acquisition. *See* Memorandum of Law Regarding Perry Reich's Status as a Ryan, Beck Customer ("Reich Mem." [#105]) at 1. He also invokes a series of theories for binding plaintiff, as a successor-in-interest, to his Gruntal Client Agreement. *See id.* at 6.

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[17] *Id.* at 8; *see id.* at 2-3; Plaintiff's Memorandum of Law In Support of Its Motion For Summary Judgment/Declaratory Judgment ("Pl. Mem." [#87]) at 14.

II. Arbitration: General Legal Principles

As a preliminary matter, while counsels' submissions are silent on this issue, it appears that the parties' disputes are governed by the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, inasmuch as (1) there are a series of written arbitration agreements (albeit ones whose applicability and scope are contested); (2) diversity provides an independent basis for federal jurisdiction; and (3) the arbitration provisions are contained in contracts affecting interstate commerce. *See Shaw Group Inc. v. Triplefine Int'l Corp.*, 322 F.3d 115, 120 (2d Cir. 2003); *ACEquip Ltd. v. Am. Eng'g Corp.*, 315 F.3d 151, 154 (2d Cir. 2003). Pursuant to section 4 of the FAA, the role of the Court is "limited to determining two issues: i) whether a valid agreement or obligation to arbitrate exists, and ii) whether one party to the agreement has failed, neglected or refused to arbitrate . . . ." *PaineWebber Inc. v. Bybyk*, 81 F.3d 1193, 1198 (2d Cir. 1996); *accord Shaw*, 322 F.3d at 120. The latter issue is not disputed, as Ryan Beck is protesting the arbitration proceedings.

As the Supreme Court has recently reiterated, the FAA expresses a strong federal policy favoring arbitration agreements. *See Howsam v. Dean Witter Reynolds, Inc.*, 123 S. Ct. 588, 591 (2002) (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983)); *see also PacifiCare Health Systems, Inc. v. Book*, 123 S. Ct. 1531, 1536 n.2 (2003). The FAA creates "a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." *Moses H. Cone*, 460 U.S. at 24 (quoted in *National Union Fire Ins. Co. v. Belco Petroleum Corp.*, 88 F.3d 129, 133 (2d Cir. 1996)). "Whether a party is bound by an arbitra-

tion clause is governed by federal law," which creates a framework of presumptions that inform the Court's analysis. *John Hancock Life Ins. Co. v. Wilson*, 254 F.3d 48, 58 (2d Cir. 2001). Nevertheless, because arbitration "is a matter of contract," *id.* (quoting *AT&T Techs., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 648, 89 L. Ed. 2d 648, 106 S. Ct. 1415 (1986)), federal courts look to "general state law contract principles" to determine whether the parties have in fact agreed to arbitrate. *John Hancock*, 254 F.3d at 58; *see Bybyk*, 81 F.3d at 1200 (state law applies to "disputes arising out of the contractual relationship," but does not impose "special rules limiting the authority of the arbitrators.") (quoting *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 59, 64 (1995)); *see also Shaw*, 322 F.3d at 120.[18]

In light of liberal federal policy favoring arbitration agreements, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone*, 460 U.S. at 24-25; *accord Shaw*, 322 F.3d at 120; *Bybyk*, 81 F.3d at 1198. This principle is, however, subject to an important exception: when the ambiguity

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[18] Each of the three Client Agreements in this case contains two choice-of-law-related provisions. The general choice-of-law provision in each states in pertinent part that "[t]his Agreement and its enforcement will be governed by the laws of the State of New York without regard to conflict of laws provisions." CX 2 and 3 at ¶ 17; PX 2A (#90 [Ex.A]), Client Agreement at ¶ 1. Each arbitration provision states, *inter alia*, that any arbitration proceeding "will be conducted pursuant to applicable Federal laws, the laws of the State of New York, without regard to the conflict of laws, and the rules of the selected arbitral facility." CX 2 and 3 at ¶ 16; PX 2A (#90 [Ex.A]), Client Agreement at ¶ 14. Given the interplay between federal and state law, this opinion will rely for the most part on cases in this circuit applying New York law. *See Shaw*, 322 F.3d at 121.

concerns who should determine arbitrability, "[t]he law then reverses the presumption to favor judicial rather than arbitral resolution." *Shaw*, 322 F.3d at 120 (citing *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944-45 (1995)); *see Bybyk*, 81 F.3d at 1198. Consequently, the issue of arbitrability may be referred to the arbitrator if and only if "there is 'clear and unmistakable' evidence from the arbitration agreement, as construed by the relevant state law, that the parties intended that the question of arbitrability shall be decided by the arbitrator." *Bybyk*, 81 F.3d at 1198-99 (quoting *First Options*, 514 U.S. at 944); *accord Howsam*, 123 S. Ct. at 591; *Shaw*, 322 F.3d at 121; *see Bensadoun v. Jobe-Riat*, 316 F.3d 171, 175 (2d Cir. 2003); *Bell v. Cendant Corp.*, 293 F.3d 563, 566 (2d Cir. 2002); *see also Smith Barney Shearson Inc. v. Sacharow*, 91 N.Y.2d 39, 45-46, 666 N.Y.S.2d 990, 993 (1997) (applying New York law and recognizing the same principles and presumptions).

The threshold issue in this case is who should determine arbitrability; in other words, should the Court or the arbitrators decide "whether the parties are bound by a given arbitration clause," *Howsam*, 123 S. Ct. at 592, and resolve the parties' disagreements as to its scope?[19] Because this determination entails an evaluation of the parties' intent, and because the facts as to Reich differ markedly from those relating to his co-defendants, Reich's situation will be separately addressed.

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[19] In *Howsam*, the Supreme Court narrowly construed "arbitrability" to encompass "gateway" issues of this nature and to exclude "procedural" questions such as limitations defenses. 123 S. Ct. at 592.

III. The Fakihs and Jones

A. The Contractual Duty to Arbitrate (Assumption/Estoppel)

In contrast to its position concerning Reich, plaintiff has conceded that, by virtue of the investors' "negative consent" in response to the notice of transfer contained in the "Dear Client Letter,"[20] the Gruntal Client Agreements with the Fakihs and Jones became the controlling contracts with those customers. *See* 9/5/02 Tr. at 15-16, 25, 71-73; 10/11/02 Tr. 19, 44-45; 1/21/03 Tr. at 21-23, 33, 48. The Second Circuit has recognized a series of "theories for binding nonsignatories to arbitration agreements," including estoppel and the doctrine of assumption of the obligation to arbitrate. *Thomson-CSF, S.A. v. Am. Arbitration Ass'n*, 64 F.3d 773, 776 (2d Cir. 1995); *see Smith/Enron Cogeneration Ltd. P'ship, Inc. v. Smith Cogeneration Int'l, Inc.*, 198 F.3d 88, 97 (2d Cir. 1999). As the Fakih and Jones Client Agreements both contain arbitration provisions, there can be no dispute that, by adopting those agreements as their own, Ryan Beck agreed to be bound by the terms of their arbitration clauses and thus assumed the duty to arbitrate. *See, e.g., Shaw Group, Inc. v. Triplefine Int'l Corp.*, No. 01 Civ. 4273 (LMM), 2001 WL 883076, at *2 (S.D.N.Y. Aug. 3, 2001) (court orders one of the petitioners, a nonsignatory to a contract containing an arbitration clause, to arbitrate its dispute with the respondent, a signatory, where it was uncontested that that contract had been assumed by that petitioner as part of an acquisition of the assets of another entity that had signed the contract), *vacated in part on other grounds*, 322 F.3d 115 (2d Cir.

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[20] *See* Pl. Mem. at 13-14; Berson Aff. (#55) at ¶¶ 7-8 & Ex. C.

2003)[21]; *see also, Fidelity & Guar. Ins. Co. v. West Point Realty, Inc.*, No. 02 Civ. 1951 LMM, 2002 WL 1933780, at *4-5 (S.D.N.Y. Aug. 21, 2002) (plaintiff, which issued a performance bond and, after its insured defaulted, entered into a Takeover Agreement that incorporated by reference the original construction contract, was bound by the arbitration provision in the original contract, although not a signatory thereto).[22]

In addition, Ryan Beck is bound to the arbitration agreements with the Fakihs and Jones under a theory of estoppel, which holds that "a nonsignatory to an agreement containing an arbitration clause may be compelled to arbitrate with a signatory where the nonsignatory knowingly accepts benefits derived directly from the agreement." *E.G.L. Gem Lab Ltd. v. Gem Quality Inst., Inc.*, No. 97 Civ. 7102 (LAK), 1998 WL 314767, at *3 (S.D.N.Y. June 15, 1998) (citing *Thomson-CSF*, 64 F.3d at 778-79). Having taken over the Fakih and Jones accounts, assets and customer relationships, subject to the protections afforded the firm by the Client Agreements, Ryan Beck thereby derived direct benefits and is estopped from avoiding the duties

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[21] On appeal in *Shaw*, the Second Circuit vacated another aspect of the district court's order, which had enjoined arbitration of a particular claim; the Court of Appeals left undisturbed the lower court's ruling that the non-signatory, "by assuming the assets of [the acquired entity], had obligated itself to comply with the arbitration provision of the Representation Agreement . . . ." 322 F.3d at 119.

[22] The fact that the arbitration provisions at issue here specifically refer to Gruntal does not affect this conclusion. *See Fidelity*, 2002 WL 1933780, at *5 (although language in the arbitration provision referred to the original contracting parties, the Takeover Agreement, by substituting plaintiff for its insured, "place[d] [plaintiff] within the scope of the arbitration clause in the Original Contract."). *See* 1/21/03 Tr. at 28-30, 46.

imposed by the arbitration provisions contained in those agreements.[23] *See Am. Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 353 (2d Cir. 1999); *Deloitte Noraudit A/S v. Deloitte Haskins & Sells, U.S.*, 9 F.3d 1060, 1064 (2d Cir. 1993).

B. The Scope of The Duty to Arbitrate

1. *Who Determines Arbitrability*

Ryan Beck does not dispute that it agreed to arbitrate with the Fakihs and Jones; instead plaintiff argues that it did not agree to arbitrate the claims now pending in arbitration, which arose on Gruntal's watch. *See* Pl. Mem. (#87) at 3, 8, 14; Pl. Reply (#103) at 2-3; 1/21/03 Tr. at 21-26. In other words, as to the Fakihs and Jones, plaintiff challenges the scope of the arbitration agreements, but not their existence or validity. *See generally Bell*, 293 F.3d at 567-68 (distinguishing between a challenge to the existence of an agreement to arbitrate and a challenge to the scope of an arbitration provision).

Ordinarily, "a disagreement about whether an arbitration clause in a concededly binding contract applies to a particular type of controversy is for the court," not the arbitrator, to resolve. *Howsam*, 123 S. Ct. at 592. However, this presumption is subject to a significant qualification: as previ-

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[23] Indeed, Ryan Beck has acknowledged that it derived a direct benefit from the arbitration clause itself, as well as from the Client Agreement as a whole: members of the NASD and NYSE are required by their rules to arbitrate with their customers at the customers' request, and thus a broker-dealer gains mutuality by including in a client agreement an arbitration clause by which the broker-dealer can compel the customer to arbitrate. *See* 1/21/03 Tr. at 35-36; Berson Aff. (#55) at ¶ 9; *see also Kidder, Peabody & Co. v. Zinsmeyer Trusts Partnership*, 41 F.3d 861, 864 (2d Cir. 1994).

ously noted, "under *First Options* and *AT&T Technologies*, the arbitrability of a given issue is a question for the court *unless* there is 'clear and unmistakable' evidence from the arbitration agreement, as construed by the relevant state law, that the parties intended that the question of arbitrability shall be decided by the arbitrator." *Bybyk*, 81 F.3d at 1198-99 (emphasis in original). Under New York law, the "court must ascertain the intent of the parties from the plain meaning of the language employed" in the agreement itself, *id.* at 1199 (quoting *Tigue v. Commercial Life Ins, Co.*, 631 N.Y.S.2d 974, 975 (4th Dep't 1995)), and, where "the intent of the parties can be determined from the face of the agreement, interpretation is a matter of law . . . ." *Bybyk*, 81 F.3d at 1199 (quoting *Am. Express Bank Ltd. v. Uniroyal Inc.*, 562 N.Y.S.2d 613, 614 (1st Dep't 1990)).

The Second Circuit's recent decision in *Shaw* is instructive on this issue. There the Court, faced with similarly broad language in an arbitration provision, vacated an order of the district court enjoining the respondent from pursuing a certain claim in arbitration against a party that, like Ryan Beck, was not a signatory to the arbitration agreement but had assumed the contract containing the arbitration clause. *See Shaw*, 322 F.3d at 119, 125. Rejecting the district court's ruling, the Court of Appeals concluded that "the evidence manifests the parties' clear and unmistakable intent to submit questions of arbitrability" —as here, issues concerning the scope of the arbitration provision—"to arbitration." *Id.* at 121.

Applying New York contract law, the Court in *Shaw* inferred that intent from the language of the arbitration clause itself. First, the Court focused on the breadth of the referral to arbitration. Although the provision did not con-

tain "an express contractual commitment of the issue of arbitrability to arbitration," the clause did provide for arbitration of "[a]ll disputes . . . concerning or arising out of" the Representation Agreement of which the clause was a part. *See id.* at 121. The Court viewed that language as sufficiently sweeping to indicate an intent to reserve the issue of arbitrability for the arbitrators. *See id.* (citing federal and New York cases construing similar provisions).

So too here, the relevant contractual provision states that "all disputes . . . arising out of or relating to [the investor's] Accounts, . . . or any construction, performance or breach of this or any other agreement between [the parties] will be settled by arbitration." CX 2 and 3 at ¶16.[24] Clearly, a referral of "all" disputes concerning the construction of the Client Agreement is sufficiently plain and sweeping to encompass disputes over the scope of the arbitration clause and to manifest the parties' intent to have the arbitrators decide that issue. *See Bybyk*, 81 F.3d at 1299 ("[t]he words 'any and all' are elastic enough to encompass disputes over whether a claim . . . is within the scope of arbitration. That provision expressly includes the category of disputes regarding the construction of the Agreement . . . ."); *Optibase, Ltd. v. Merrill Lynch Inv. Managers*, No. 02 Civ. 9813 (LTS), 2003 WL 1587244, at *3-4 (S.D.N.Y. March 27, 2003) (arbitration clause that covered "all controversies that may arise . . . , including but not limited to, those involving . . . the construction, performance or breach of this or any other agreement . . . ," required the court to defer to the arbitrator's arbitrability

[24] *See supra* note 8. The only carve-out relates to disputes arising out of or relating to "regulated commodity accounts," CX 2 and 3 at ¶16, which are not implicated here.

decision); *New Avex, Inc. v. Socata Aircraft Inc.*, No. 02 Civ. 6519 DLC, 2002 WL 1998193, at *1, 5-6 (S.D.N.Y. Aug. 29, 2002) (arbitrability issue was reserved for arbitration, where the arbitration clause encompassed "[a]ny dispute, controversy or claim arising under or related to this agreement, other than a dispute concerning a Withheld Amount . . . .").

In *Shaw*, the Second Circuit additionally found that "the parties' intent to arbitrate arbitrability [was] further evidenced by their agreement to refer all disputes to" the International Chamber of Commerce, the rules of which provide for the arbitral body to resolve questions of arbitrability. *Shaw*, 322 F.3d at 122. In this case, the arbitration clause in the Jones and Fakih Client Agreements expressly provides for arbitration proceedings before the NASD, conducted pursuant to "the rules of the selected arbitral facility." CX 2 and 3 at ¶16. As the Second Circuit recognized in *Bybyk*, the NASD Code commits "all issues, including issues of arbitrability . . . , to the arbitrators." 81 F.3d at 1202; *accord Shaw*, 322 F.3d at 123; *Howsam*, 123 S. Ct. at 593 (citing NASD Code of Arbitration Procedure § 10324). Consequently, the contractual reference to NASD arbitrations and rules provides further evidence of the parties' "clear and unmistakable intent" to submit questions of arbitrability to the arbitrators.

2. *The Language in the Acquisition Agreement*

In seeking to avoid arbitration, Ryan Beck relies on the "plain meaning" of the Acquisition Agreement. *See* Pl. Reply (#103) at 3. That reliance is misplaced. First, as demonstrated by *Shaw*, *Bybyk*, and the New York cases cited therein, to determine the intent of the parties, the

Court must look to the language of the arbitration provision and construe the contract of which it is a part. As the arbitration provision here is plain on its face,[25] extrinsic evidence may not be considered. *See Kidder, Peabody & Co. v. Zinsmeyer Trusts Partnership*, 41 F.3d 861, 865 (2d Cir. 1994) (citing *Int'l Klafter Co. v. Cont'l Cas. Co.*, 869 F.2d 96, 100 (2d Cir. 1989));[26] *see also John Hancock*, 254 F.3d at 60 (citing *Klafter*). This principle applies with particular force where, as here, the extrinsic evidence does not relate to discussions among the parties, but rather concerns a document to which the investors were not privy.

Whatever the intent of Ryan Beck and the Gruntal entities in entering into the Acquisition Agreement, it is undisputed that the terms of that document, and the temporal limit that plaintiff seeks to impose, were not communicated to Gruntal's customers—in the "Dear Client Letter" or otherwise—in soliciting their negative consent to transfer their accounts from Gruntal to Ryan Beck. *See* 1/21/03 Tr. at 24, 26, 34. Even assuming *arguendo* that the Acquisition Agreement may be read to limit Ryan Beck's duty to arbitrate claims arising prior to the Closing Date,[27] that

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[25] *See generally infra* note 28.

[26] In *Kidder, Peabody*, the Second Circuit held that the excision, from a brokerage firm's Customer Agreement, of a provision authorizing either party to demand arbitration, did "not evidence a clear intent to waive the customer's arbitration right" under the NASD Code; the Court refused to consider the contents of the transmittal letter that accompanied the revised version of the Customer Agreement, as "there [was] no ambiguity" in that agreement and thus "no reason to incorporate the transmittal letter into the contract." 41 F.3d at 865.

[27] However, while disclaiming liability for antecedent claims, the language relied on (stating that Ryan Beck "will not assume . . . liabilities for litigation, arbitrations or other claims relating to operations

limitation was not incorporated by reference into the Client Agreements assumed by Ryan Beck. Under New York law and the law of this Circuit, two essential elements must be satisfied before a document will be deemed to have been incorporated by reference into another instrument or agreement. First, the agreement must specifically reference and sufficiently describe the document to be incorporated, such that the latter "may be *identified beyond all reasonable doubt.*" *Bybyk*, 81 F.3d at 1201 (quoting *Chiacchia v. Nat'l Westminster Bank USA*, 507 N.Y.S.2d 888, 889-90 (2d Dep't 1986)) (emphasis supplied in Bybyk). Second, "it must be clear that the parties to the agreement had knowledge of and assented to the incorporated terms." *Bybyk*, 81 F.3d at 1201 (quoting *Lamb v. Emhart Corp.*, 47 F.3d 551, 558 (2d Cir. 1995)); *see generally Federated Mut. Ins. Co. v. Woodstock '99, LLC*, 140 F. Supp.2d 225, 228 (N.D.N.Y. 2001) (before a document will be deemed incorporated by reference, "the document to be incorporated must be identified with sufficient specificity," and "there must be a clear manifestation of an intent to be bound by the terms of the incorporated instrument.").

Neither of these elements is satisfied here. First, the Client Agreement in no way refers to a separate contract that was neither in existence nor even contemplated when the Client Agreement was executed. To the extent that the "Dear Client Letter" is regarded as a supplemental agreement substituting Ryan Beck for Gruntal, none of that letter's "oblique references to an otherwise unidentified [acquisition arrangement] meet[s] [the] exacting standard"

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prior to the Closing Date . . . ," Acquisition Agreement § 1(B)(2) (#55 [Ex.A]), does not clearly disclaim the duty to arbitrate those claims. *See* 9/5/02 Tr. at 17-19; 1/21/03 Tr. at 27.

for incorporation by reference. *Shark Info. Servs. Corp. v. Crum & Forster Commercial Ins.*, 634 N.Y.S.2d 700, 701 (1st Dep't 1995) (where insurance policy inadvertently omitted a flood exclusion, vague references in the policy to a separate "Coverage Form" were insufficient to bring the claimed exclusion within the policy under the doctrine of incorporation by reference).

Nor can it be said that the investors' "negative consent" to transfer their accounts to Ryan Beck in any way manifested their intent to be bound by the terms and conditions of a series of agreements that had not been provided or explained to them. *See Federated*, 140 F. Supp.2d at 228-29 (letter agreement between the sponsor of a music festival and a supplier did not incorporate by reference a waiver-of-the-right-to-subrogation provision contained in a separate agreement between the festival organizer and the sponsor, even though the letter agreement specifically referenced the agreement between the organizer and sponsor); *see also Kidder, Peabody*, 41 F.3d at 864-65; *Thomson-CSF*, 64 F.3d at 777. Accordingly, as a matter of basic contract law, the intent of the parties cannot be drawn from the Acquisition Agreement between Ryan Beck and the Gruntal entities.

3. The Decision in Dusch

To support its contention that Ryan Beck assumed the obligation to arbitrate only those claims arising after the Closing Date, plaintiff cites the district court's decision in *Prudential-Bache Securities v. Dusch*, 1994 WL 374425 (S.D. Cal. March 28, 1994). The *Dusch* opinion is of limited precedential value and persuasive force. First, the decision does not address the threshold question of who

determines arbitrability—an issue that, in this Circuit and on the facts of this case, mandates a ruling in favor of the Fakihs and Jones. Moreover, while the court in *Dusch* reached and resolved the scope of the duty to arbitrate, the opinion does not quote the language of the arbitration provision, which was contained on the signature card that was transferred to Prudential Securities from Thompson McKinnon Securities when its assets were acquired by Prudential. Indeed, in concluding that "the card does not apply to the time before Dusch became a customer of Prudential," *id.* at 2, the court focused instead on the language of the purchase agreement between Prudential and Thompson McKinnon. *See id.* As previously noted, such an analysis is at odds with case law in this Circuit and in New York State.

For the foregoing reasons, this Court must defer to the arbitrators on the parties' disputes about the arbitrability of the claims of the Fakihs and Jones.[28]

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[28] Even if this Court agreed with Ryan Beck that the issue of arbitrability should not be reserved for the arbitrators, plaintiff's attempt to superimpose a temporal limitation onto the contractural arbitration provision would not succeed. In accordance with the strong federal policy favoring arbitration, courts must "construe arbitration clauses as broadly as possible," *Oldroyd v. Elmira Sav. Bank, FSB*, 134 F.3d 72, 76 (2d Cir. 1998) (citation and internal quotation marks omitted), and "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration . . . ." *Moses H. Cone*, 460 U.S. at 24-25; *accord Bell*, 293 F.3d at 566. Furthermore, "the strong federal presumption in favor of arbitrability applies with greater force when an arbitration clause is a broad one," as here. *McDonnell Douglas Fin. Corp. v. Pa. Power & Light Co.*, 858 F.2d 825, 832 (2d Cir. 1988) (citing *AT&T Techs., 475 U.S. at 650*); *accord Oldroyd*, 134 F.3d at 76. Indeed, the presumption in favor of arbitrability is so strong that, upon finding a broad, enforceable arbitration agreement, the court must compel arbitration "unless it may be said with positive assurance that the

IV. Perry Reich

The facts as to Reich are entirely distinguishable, and the law thus compels a different result. Ryan Beck does not concede that it assumed Reich's Client Agreement with Gruntal; to the contrary, plaintiff argues that Reich never became its customer and that therefore those parties never entered into any arbitration agreement of any scope.

Under these circumstances, the parties' quarrel as to arbitrability may not be deferred to the arbitrators. As the Supreme Court has observed, "a gateway dispute about

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arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *AT&T Techs.*, 475 U.S. at 650; *accord Mehler v. Terminix Int'l Co.*, 205 F.3d 44, 49 (2d Cir. 2000); *see Smith/Enron*, 198 F.3d at 99; *Oldroyd*, 134 F.3d at 76.

In this case, it cannot be said with positive assurance that the broad arbitration clause in the Client Agreement excludes arbitration of disputes arising prior to the Closing Date. Indeed, Ryan Beck has conceded that the clause is silent on this issue (*see* 1/21/03 Tr. at 34; *see also id.* at 26) and that no such limitation was communicated to the investors whose accounts were transferred. *See id.* at 24, 26. Contrary to Ryan Beck's assumption, "the Second Circuit has expressly rejected the argument that securities industry arbitration agreements cannot be applied retroactively." *Marcus v. Masucci*, 118 F. Supp.2d 453, 457 (S.D.N.Y. 2000). Thus, where, as here, the arbitration clause did "not contain any temporal limitation," the Second Circuit has compelled arbitration despite the fact that the challenged conduct predated the signing of the parties' agreement. *Smith/Enron*, 198 F.3d at 99 ("SCI's argument that its claims against Enron concern events that predate the 1994 Agreement does not persuade us that the district court erred here in ordering arbitration.") (citing *Coenen v. R.W. Pressprich & Co.*, 453 F.2d 1209, 1212 (2d Cir. 1972) ("we think the clause is clear on its face. It reads 'any controversy,'" not "any future controversy . . . .")); *see ACE Capital Re Overseas Ltd. v. Central United Life Ins. Co.*, 307 F.3d 24, 31, 34 (2d Cir. 2002) (arbitration clause's "temporally non-limiting" language did not exclude disputes arising "pre- and post-contract formation.").

whether the parties are bound by a given arbitration clause raises a 'question of arbitrability' for a court to decide." *Howsam*, 123 S. Ct. at 592; *see ACEquip*, 315 F.3d at 155 ("the first type of factual scenario, involving the existence of the arbitration agreement itself, generally presents an issue for the court to decide."); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964) (court must decide whether an arbitration clause survived a corporate merger and bound the resulting corporation); *Calamia v. Riversoft, Inc.*, No. 02-CV-1094 (FB) (RML), 2002 WL 31779991, at *5 (E.D.N.Y. Dec. 13, 2002) ("Whether . . . a non-signatory[] should be deemed a party to the agreement, and hence a party to the arbitration clause, under any of the traditional principles of agency or contract law is an issue for the Court to decide.") This Court must therefore determine whether Ryan Beck is somehow bound to arbitrate Reich's claims against it.[29]

A. Assumption/Estoppel (Reich's Customer Status)

The logical starting point in this analysis is an examination of the record to ascertain whether Reich's theory that he became a Ryan Beck customer is factually sustainable. In determining arbitrability in connection with a motion to

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[29] To the extent that any of Reich's arguments may be read to suggest that Ryan Beck's membership in the NASD in and of itself warrants submission of the arbitrability question to the arbitral body, that argument is foreclosed by the Second Circuit's decision in *John Hancock*, 254 F.3d at 53 ("John Hancock's membership in the NASD, without more, is not sufficient to show that the parties agreed to submit the question of arbitrability to the arbitrators . . . ."); *see also id.* at 57 ("absent an express agreement between the Investors and John Hancock incorporating the NASD Code or providing 'any and all' disputes be settled in arbitration, the district court properly undertook the determination of whether the Investors' claims are arbitrable.").

prevent arbitration, "the court applies a standard similar to that applicable for a motion for summary judgment." *Bensadoun*, 316 F.3d at 175. Thus, in ruling on Ryan Beck's motion, the Court must review the record to determine whether there are any genuine issues of fact as to the making of an arbitration agreement with Reich, so as to require a hearing. *See* Fed. R. Civ. P. 56(c); *Bensadoun*, 316 F.3d at 175; *cf.* 9 U.S.C. § 4. In this regard, "[t]he Supreme Court has held that 'the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.'" *Opals on Ice Lingerie v. Bodylines Inc.*, 320 F.3d 362, 368 (2d Cir. 2003) (quoting *Anderson v. Liberty Lobby*, 477 U.S. 242, 247-48 (1986) (emphasis in original)).

Judged by this standard, and with the evidence analyzed in light of New York contract law, Reich's submissions fail to create any genuine issue of material fact to support his theory that he, like his co-defendants, became a customer of Ryan Beck, which thereby assumed the benefits and obligations of his Client Agreement.

"Under New York law, a contract for services that makes no specific provision for duration is presumed to be terminable at will." *White Plains Towing Corp. v. Patterson*, 991 F.2d 1049, 1062 (2d Cir. 1993). Reich's communications with Gruntal in March 2001,[30] and his subsequent transfer of all of the assets in his accounts to another brokerage firm, clearly and unequivocally indicated that he was terminating his relationship with Gruntal and rescind-

[30] *See* PX 2A and PX 4 (#90 [Ex.A]) (letters dated March 16, 2001, and March 17, 2001).

ing Gruntal's authority to act on his behalf.[31] Such a severance need not be preceded by any particular verbal formulation. New York courts have held that a "broker/principal relationship and accompanying fiduciary duty can be severed by agreement of the parties or by unilateral action of the principal." *Dubbs v. Stribling & Assocs.*, 96 N.Y.2d 337, 340, 728 N.Y.S.2d 413, 415, 752 N.E.2d 850 (2001) (citations omitted); *see Aegis Prop. Servs. Corp. v. Hotel Empire Corp.*, 484 N.Y.S.2d 555, 561 (1st Dep't 1985) ("the right of the principal to terminate [the broker's] authority is absolute and unrestricted.") (citation and internal quotation marks omitted). "Authority created in any manner terminates when either party in any manner manifests to the other dissent to its continuance . . . ." Restatement (Second) of Agency § 119 (1985). Accordingly, "[a] revocation of an agent's authority . . . may be implied by words or conduct of a principal which are inconsistent with the continuation of authority." *Whiting v. Marine Midland Bank-Western*, 365 N.Y.S.2d 628, 644 (Sup. Ct. 1975); *see also Savitsky v. Sukenik*, 659 N.Y.S.2d 48, 50 (2d Dep't 1997) ("In general, abandonment of a contract need not be express, but may be inferred from the conduct of the parties and the attendant circumstances.") (citing *Rosiny v. Schmidt*, 587 N.Y.S.2d 929, 932 (1st Dep't 1992)).

Unquestionably, once Reich cancelled his contract with Gruntal, removed his funds, and opened accounts at another brokerage firm, his relationship with Gruntal came

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[31] Reich conceded as much at oral argument, stating that, in light of his actions terminating his Client Agreement with Gruntal, "he's not a customer in that respect." 1/21/03 Tr. at 92.

to an end; there was no open Gruntal account or existing contract for Ryan Beck to assume.

Notably, Reich proffers no sworn statement to the effect that he considered himself to be a Ryan Beck customer; indeed, when asked at his deposition to identify all his current and previous brokerage accounts, Ryan Beck was conspicuously absent from the list. *See* Reich Dep. (#90 [Ex.A]) at 6-7. That omission is entirely understandable, inasmuch as he does not dispute that he closed his Gruntal accounts, and transferred all of his assets to another firm, *more than one year prior* to the acquisition. *See id.* at 31-32; 1/21/03 Tr. at 85-89, 92, 110. Reich never maintained any assets at Ryan Beck, never engaged in any transactions through or with Ryan Beck, never received a monthly statement or other communication from Ryan Beck (apart from the "Dear Client Letter"), and had no dealings whatsoever with representatives of Ryan Beck. *See* Reich Dep. (#90 [Ex.A]) at 31-33; 1/21/03 Tr. at 89, 114-16.

"Under New York contract law, . . . if there is no meeting of the minds on all essential terms, there is no contract. This is because an enforceable contract requires mutual assent to the essential terms and conditions thereof." *Opals on Ice*, 320 F.3d at 372 (quoting *Schurr v. Austin Galleries of Ill.*, 719 F.2d 571, 576 (2d Cir. 1983)) (internal citations and quotation marks omitted). With respect to Reich and Ryan Beck, "it is clear from the record that there was no meeting of the minds, and no contract was ever formed." *Opals on Ice*, 320 F.2d at 371-72. Therefore, there was no agreement to arbitrate.

In spite of these facts and legal principles, Reich advances the notion of an "implied contractual relationship between Ryan, Beck and Perry Reich" (1/21/03 Tr. at 93), and asserts that he "must be deemed to have been a 'cus-

tomer' of Ryan, Beck." Reich Mem. (#105) at 1. In support of this argument, he cites his receipt of the "Dear Client Letter," and his ability to access his account information—showing a zero balance—through the Ryan Beck website sometime after April and prior to October 2002. *See* Reich Mem. (#105) at 1-2; 1/21/03 Tr. at 89.[32] However, plaintiff's unchallenged proof as to the applicable records retention policy refutes any inference that Gruntal's transfer of the file to Ryan Beck, Reich's receipt of the "Dear Client Letter," and the inclusion of his account information in the clearing firm's database, resurrected an otherwise dead account. *See Gruntal & Co. v. Steinberg*, 843 F. Supp. 1, 12 (D.N.J. 1994) (rejecting suggestion that the acquiring entity's "mere possession of documents relating to" the investors' account at the acquired entity "requires a finding" that the acquirer is "bound by" the predecessor's contract with the investors).

It is uncontroverted that Pershing LLC ("Pershing")—the clearing firm that served as the "back office" and handled "operational functions" for Gruntal and for Ryan Beck[33]—typically "maintains an account with the 'closed' designation for approximately 18 months," during which time the customer would not be able to engage in transac-

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[32] Ryan Beck responds that any such on-line access would at all times have revealed that Reich's accounts were "closed." *See* Pl. Supp. Br. (#90) at 3-4; Deposition of Dennis Tobin ("Tobin Dep.") at 27, appended as Exhibit B to Pl. Supp. Br. (#90); 1/21/03 Tr. at 106. For purposes of this motion, the Court will assume otherwise, given Reich's (undocumented) assertion to the contrary. *See* Reich Dep. (#90 [Ex.A]) at 19-23. Nevertheless, for all intents and purposes, the account was closed—whether or not so labeled on the website.

[33] Affidavit of Tom DelleCave ("DelleCave Aff.") at ¶2 (attached as Exhibit A to Supplemental Affidavit of Joel E. Davidson [#107]); Tobin Dep. (#90 [Ex.B]) at 21-22.

tions without first arranging to reopen the account. Pl. Supp. Br. (#90) at 6-7 (citing *Tobin* Dep. at 23-26). As Reich closed his accounts in April 2001, his name was not scheduled to be purged from the clearing firm's list of open and closed accounts until October 2002. *See* Pl. Supp. Br. (#90) at 7-8; Affidavit of Linda Scorsone in Support of Ryan, Beck's Motion for Summary Judgment ("Scorsone Aff." [#91]) at ¶3; DelleCave Aff. (#107) at ¶3. The "Dear Client Letter" was sent to all account-holders whose files had not yet been purged. For those whose accounts had been closed in 2002, the notification of the transfer had some significance, as those former Gruntal customers needed to be sent 1099 tax information forms in early 2003. Rather than delay the issuance of the "Dear Client Letters" by first creating a system to sort out those whose accounts had been closed but not yet purged, Pershing sent the letter to all Gruntal customers and former customers whose account information had not been purged. *See* Scorsone Aff. (#91) at ¶3; DellaCave Aff. (#107) at ¶3; Berson Aff. (#55) at ¶7.

In similar circumstances, also involving the Gruntal acquisition by Ryan Beck, the district court in *Ryan Beck & Co. v. Campbell*, No. 02 C 7016, 2002 WL 31696792 (N.D. Ill. Dec. 2, 2002), *reconsideration denied*, 2003 WL 193524 (N.D. Ill. Jan. 28, 2003), issued a preliminary injunction against further arbitration proceedings. Addressing the likelihood of Ryan Beck's success, the court observed:

> We are convinced, at this point, that Ryan Beck never entered into any agreement to arbitrate with Campbell. Campbell withdrew all the assets in his accounts at Gruntal by February 2002, months before Ryan

> Beck acquired the customer accounts of Gruntal. Campbell was never a client of Ryan Beck. No contracts were executed between Campbell and Ryan Beck. Based on this evidence, we find that Ryan Beck is likely to prevail in proving that it did not enter into an agreement to arbitrate disputes with Campbell.

Id. *2.

Given the record in the present ease, Reich has failed to present an issue of material fact to support his demand that he be "deemed" to have been a customer of Ryan Beck. Therefore, Ryan Beck cannot be said to have assumed Reich's Client Agreement with Gruntal or its contractual obligation to arbitrate. Nor did Ryan Beck receive any direct benefits from Reich's closed accounts, the Client Agreement, and/or the arbitration clause contained therein; thus, plaintiff is not estopped from denying any duty to arbitrate with Reich. *See Thomson-CSF*, 64 F.3d at 778-79.

B. The NASD Code

Reich also cites the NASD Code of Arbitration Procedure as an alternative basis for plaintiff's obligation to arbitrate Reich's claims. As a member of that organization, Ryan Beck is required to abide by its rules and regulations, including those provisions governing arbitration of covered disputes. *See* NASD Code of Arbitration Procedure § 10301(a). The NASD Code contains "two prerequisites before an NASD member can be compelled to arbitrate." *Wheat, First Securities, Inc. v. Green*, 993 F.2d 814, 820 (11th Cir. 1993). "First, a complaining party must be a 'customer' of the NASD member, and second, the 'dispute, claim or controversy' must have arisen 'in connection with the business of such member.'" *Id.* at 820.

The Second Circuit has emphasized that the term "customer," as used in the NASD Code, is broadly defined, "excluding only 'a broker or dealer.'" *John Hancock*, 254 F.3d at 59; *accord Bensadoun*, 316 F.3d at 176.[34] Nevertheless, as was recently made clear by the Second Circuit's opinion in *Bensadoun*, the term "customer" is not all-encompassing. In looking to other circuits for "guidance on the meaning of 'customer,'" the Court cited with approval the Eleventh Circuit's decision in *Wheat*; that case held that "'customer status . . . must be determined as of the time of the events providing the basis for the allegations of fraud, [] so that allegations against a predecessor-in-interest did not give rise to a duty to arbitrate on the part of the successor.'" *Bensadoun*, 316 F.3d at 177 (quoting *Wheat*, 993 F.3d at 820); *accord Gruntal & Co. v. Steinberg*, 854 F. Supp. 324, 340 (D.N.J. 1994) ("Like the acts of fraud involved in Wheat, the misconduct which is the subject of the Arbitration Proceedings took place, in its entirety, at least two months before the Steinbergs became customers of Gruntal. Because these acts were committed when the Steinbergs were not customers of Gruntal, Gruntal cannot be compelled to arbitrate with the Steinbergs by virtue of the NASD Code of Arbitration Procedure.") (citations omitted); *see also Dusch*, 1994 WL 374425, at *2 ("As far as the NASD Code of Arbitration requirement that an NASD member arbitrate claims upon demand of the customer, this only applied once Dusch became a customer of Prudential. Prior to her becoming a customer of Pru-

[34] For example, the Court held in *John Hancock* that a customer of an "associated person" could demand arbitration against an NASD member, even though the customer had no direct relationship with the member but was only a customer of the member's associated person. 254 F.3d at 59-60.

dential, there was no agreement to arbitrate.") (citing *Wheat*).

Reich cites no decisions adopting his construction of the NASD Code. Instead, he relies on cases like *John Hancock*, which are "materially different" (*Bensadoun*, 316 F.3d at 176), in that there the member had the ability to exercise supervisory control over its associated person at the time of the alleged misconduct.[35] Given the unbroken line of cases rejecting the theory espoused by Reich, and the Second Circuit's recent endorsement of the analysis contained in *Wheat*, this Court rules that Reich's reliance on the NASD Code is misplaced and that the Code does not provide an independent basis for compelling arbitration of his claims.

C. Successor-in-Interest

Citing a provision in his Client Agreement that the contract "shall inure to the benefit of and be binding upon [the signatories] and [their] respective ... successors and assigns," PX 2A (#90 [Ex.A]), Client Agreement at ¶1, Reich additionally argues that Ryan Beck is Gruntal's successor-in-interest and thus is bound by the contractual arbitration provision. *See* Reich Mem. (#105) at 3, 5-6; *see also* Def. Joint Mem. (#90) at 15-23 (arguing that Ryan Beck is a successor to Gruntal). As noted earlier, the Second Circuit has recognized a series of doctrines, based on "common law principles of contract and agency law," for binding non-signatories to arbitration agreements. *Thomson*, 64 F.3d at 776; *see Smith/Enron*, 198 F.3d at 97. In addition to assumption and estoppel, these principles include the same theories under which a corporation that

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[35] *See supra* note 34.

acquires the assets of another entity can be held to have assumed the predecessor's liabilities: a "*de facto* merger" of the two entities; a "mere continuance" of the predecessor by the successor; or a fraudulent transfer. *See Freeman v. Complex Computing Co.*, 931 F. Supp. 1115, 1121-22 (S.D.N.Y. 1996), *aff'd in part, rev'd and vacated in part on other grounds*, 119 F.3d 1044, 1053 (2d Cir. 1997) (expressly affirming this aspect of the appeal "for the reasons stated by the district court."). Ryan Beck contends that none of these bases for successor liability has been satisfied in this case. *See* Pl. Mem. (#87) at 22-27.[36]

The determination of the issue of successor liability is fact-specific. *See, e.g., Beck v. Roper Whitney*, 190 F. Supp.2d 524, 534 (W.D.N.Y. 2001); *Sweatland v. Park Corp.*, 181 A.D.2d 243, 587 N.Y.S.2d 54, 56 (4th Dep't 1992) (affirming denial of summary judgment motion filed by successor corporation and noting that courts must "make, on a case-by-case basis, an analysis of the weight and impact of a multitude of factors . . . .") (citation and internal quotation marks omitted). The kinds of factors that the Court must analyze, "in a flexible manner," were recently summarized by the Second Circuit:

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[36] Although Ryan Beck's initial brief could be construed to seek summary judgment absolving plaintiff of liability for the investors' underlying claims, *see* Pl. Mem. (#87) at 22-27, plaintiff's reply brief makes clear that it is not now asking for such relief. *See* Pl. Reply Mem. (#103) at 10; *see also* Plaintiff's Notice of Motion (#92) at 1. At the same time, plaintiff asks the Court to "permanently stay the arbitration without ruling on the successor-in-interest issue." Pl. Reply Mem. (#103) at 10. However, in deciding whether to permanently enjoin the arbitration, the Court will have to address whether Ryan Beck is Gruntal's successor-in-interest and, on that basis, bound to arbitrate with Reich.

> To determine whether such a "*de facto* merger" or "mere continuation" of the predecessor's business has occurred, courts consider (1) continuity of ownership; (2) cessation of ordinary business by the predecessor; (3) assumption by the successor of liabilities ordinarily necessary for continuation of the predecessor's business; and (4) continuity of management, personnel, physical location, assets, and general business operation.

Nettis v. Levitt, 241 F.3d 186, 193-94 (2d Cir. 2001) (reversing district court's denial of motion to amend pleading to add claim against employer's purported successor-in-interest) (citing *Sweatland*, 587 N.Y.S.2d at 56). "Each of these factors is relevant, but the presence or absence of any single factor is not determinative." *Freeman*, 931 F. Supp. at 1122; *see Fitzgerald v. Fahnestock & Co.*, 286 A.D.2d 573, 730 N.Y.S.2d 70, 71 (1st Dep't 2001) (reversing dismissal of complaint alleging *de facto* merger).

From the limited record developed thus far, it appears that Ryan Beck acquired more than just fixed assets from Gruntal; plaintiff also acquired its intangible assets, such as good will, customer accounts, personnel, and the right to use the Gruntal name, internet address, phone numbers, trademarks, as well as most of its office space. *See, e.g.*, Fakih 56.1 Stmt. (#94) at ¶¶(e)-(p) & documents cited therein. Compare *Freeman*, 931 F. Supp. at 1123 (no *de facto* merger where there was no continuity of "physical location, management, assets, or personnel."). Although Gruntal initially survived the asset transfer as a distinct corporation—albeit one that defendants have characterized as a "shell" (*see, e.g.*, Def. Joint Mem. [#99] at 20)—it filed for bankruptcy within approximately six months of

the Closing Date.[37] Additionally, defendants have raised questions about the adequacy of the consideration and the *bona fides* of the transaction (*see, e.g.*, Fakih 56.1 Stmt. (#94) at ¶¶(h)-(i) & documents cited therein)—factors bearing on the issue of fraudulent transfer. *See Freeman*, 931 F. Supp. at 1123 ("Under New York law governing fraudulent conveyances, a transaction is not fraudulent if it is both an exchange for equivalent value and made in good faith.").

Little or no discovery on these issues has taken place; thus, the record has not been sufficiently developed to enable the Court to determine whether, pursuant to any of the aforementioned theories, Ryan Beck is bound, as Gruntal's successor-in-interest, to the arbitration agreement between Gruntal and Reich. *See Calamia*, 2002 WL 31779991, at *6.[38] "Under these circumstances, plaintiff should be allowed to conduct further discovery to determine whether the transaction constituted a de facto merger" or otherwise gives rise to successor liability. *Sweatland*, 587 N.Y.S.2d at 55 (citing *Wensing v. Paris Indus.-NY*, 558 N.Y.S.2d 692 at 694 (3rd Dep't 1990)).

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[37] *See supra* p. 8.

[38] Earlier in the lawsuit, in addressing Ryan Beck's motion for summary judgment on successor liability, *see generally* Memorandum of Law in Support of Plaintiff's Motion for Temporary and Preliminary Injunctive Relief and Summary Judgment (#2), this Court observed that, given the limited record developed to that point, there appeared to be contested factual issues that warranted denying the motion without prejudice. *See* Calendar Order dated July 31, 2002; 9/20/02 M&O at 1 n.1; 9/5/02 Tr. at 57; 1/21/03 Tr. at 51. Since that time, discovery has for the most part been limited to the issue of Reich's status as a customer of Ryan Beck. *See* 1/21/03 Tr. at 51.

D. Temporary Stay of Reich's Arbitration Proceeding

Given the Court's conclusion that Reich was not a customer of Ryan Beck but that factual issues remain as to whether Ryan Beck is a successor-in-interest to Gruntal, Reich's arbitration proceeding should now be stayed pending resolution of this lawsuit. *See Bensadoun*, 316 F.3d at 178.[39]

CONCLUSION

For the foregoing reasons, Ryan Beck's motions are denied in all respects. The cross-motions of the Fakihs and Jones are granted in part and, as to those investors, the issue of the scope of the arbitration clause is deferred to the arbitrators. The proceedings in this action in connection with the Fakihs and Jones are stayed pending arbitration. Reich's arbitration proceeding is stayed pending the resolution of this lawsuit.

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[39] At the time the Court rejected Ryan Beck's request for a preliminary injunction, no discovery had taken place and the Court thus could not assess whether or not Reich became a customer of Ryan Beck. Now that the Court has concluded that Reich was not a customer, the circumstances have materially changed and, consistent with *Bensadoun*, warrant a temporary stay of the arbitration proceeding initiated by Reich.

The Clerk of the Court shall transmit copies of this Memorandum and Order, by fax and overnight courier, to all counsel of record.

SO ORDERED.

Dated: June 20, 2003

ROANNE L. MANN
UNITED STATES MAGISTRATE JUDGE

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Supreme Court, U.S.
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(2)

No. 06-1591

In the Supreme Court of the United States

PERRY REICH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether intent to defraud is an element of the offense of forging the signature of a federal judge under 18 U.S.C. 505.

2. Whether the district court abused its discretion in allowing cross-examination of petitioner's character witness about a specific instance of petitioner's conduct.

3. Whether an effect on the ultimate outcome of the proceedings is an element of the offense of obstruction of justice under 18 U.S.C. 1512(c)(2) (Supp. IV 2004).

4. Whether the false statement supporting a conviction under 18 U.S.C. 1001 (2000 & Supp. IV 2004) must be in a recording, transcript, or other written document.

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PERRY REICH, PETITIONER

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 479 F.3d 179. The opinion of the district court (Pet. App. 26a-58a) is reported at 420 F. Supp. 2d 75.

JURISDICTION

The judgment of the court of appeals was entered on March 2, 2007. The petition for a writ of certiorari was filed on May 29, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of corruptly obstructing a judicial proceeding, in violation of 18 U.S.C. 1512(c)(2) (Supp. IV

2004); forging a judge's signature, in violation of 18 U.S.C. 505; and making a false statement to a federal officer, in violation of 18 U.S.C. 1001(a)(2). He was sentenced to 27 months of imprisonment, to be followed by two years of supervised release. The court of appeals affirmed. Pet. App. 1a-25a.

1. In 2002, petitioner, a lawyer, brought an arbitration claim against his brokerage firm, Gruntal & Co., alleging that the firm mishandled his brokerage account and caused him to lose about $2 million in savings. Pet. App. 3a; PSR para. 5. Gruntal petitioned for bankruptcy, and another brokerage firm, Ryan Beck & Co. (Ryan Beck), purchased its assets. Petitioner amended his arbitration claim to proceed against Ryan Beck. Ryan Beck, in turn, filed a lawsuit in the United States District Court for the Eastern District of New York against petitioner and other investors with pending arbitrations; it sought to enjoin the investors from proceeding against it in arbitration. Pet. App. 3a-4a.

The case was assigned to Chief Judge Edward R. Korman, who referred it, with the consent of the parties, to Magistrate Judge Roanne L. Mann. Pet. App. 4a. In September 2002, Magistrate Judge Mann denied Ryan Beck's motion for a preliminary injunction staying arbitration. On June 4, 2003, she denied reconsideration. Thereafter, Ryan Beck sought a writ of mandamus from the United States Court of Appeals for the Second Circuit to compel Magistrate Judge Mann to rule on its pending summary judgment motion. *Id.* at 4a-5a & n.4.

While waiting for a ruling on the mandamus petition, Joel Davidson, counsel for Ryan Beck, received a facsimile at 11:10 a.m. on June 17, 2003, that purported to be an order issued by Magistrate Judge Mann. Pet. App. 6a. The order had the same caption, final page,

and facsimile header as Magistrate Judge Mann's June 4 order, and it appeared to be authentic. *Ibid.* In fact, it was a forgery—the date of the June 4 order had been changed by hand, and new text had been pasted in. *Ibid.* The new text contained information that only someone knowledgeable in the law and familiar with the litigation would have known. *Ibid.* It purported to vacate the order denying a preliminary injunction, to enjoin the defendants from proceeding in arbitration, and to recuse Magistrate Judge Mann from further proceedings. *Ibid.*

Upon receiving the order, Davidson believed that it was legitimate and that it mooted Ryan Beck's mandamus petition, so he drafted a letter withdrawing the petition. Pet. App. 6a. Davidson also circulated the order to counsel representing Ryan Beck in other jurisdictions. *Ibid.*

Magistrate Judge Mann learned of the forged order when the attorney for another defendant called her chambers seeking a copy. Pet. App. 6a. She then issued an order stating that the forged order was fraudulent and had not been issued by the court. *Id.* at 6a-7a. She also reported the incident to the United States Attorney's Office. *Id.* at 7a.

The Federal Bureau of Investigation began an investigation, which uncovered phone records that linked petitioner's phone number to the fax transmission. Specifically, the records showed that "at 11:08 a.m. on June 17, a call lasting several minutes was initiated to Davidson's fax machine from [petitioner's] home using a pre-paid calling card." Pet. App. 6a. Agents then discussed the incident with petitioner on three separate occasions. At first, petitioner denied that he had any contact with Davidson on June 17, 2003, and he denied using prepaid phone cards. Pet. App. 7a. In a subsequent interview,

petitioner said that he "may have contacted Davidson" that day and "may have dialed the fax line inadvertently and hung up." *Ibid.* When asked "why such an inadvertent call would last over three minutes, he stated that his phone did not always disconnect the line immediately upon hanging up." *Ibid.* Later, petitioner and his attorney had another meeting with the agents, and petitioner said that "he had dialed the Davidson fax by mistake" and that he did not own or use prepaid calling cards, but that he had purchased one for his girlfriend. *Id.* at 7a-8a.

2. A federal grand jury in the Eastern District of New York returned a three-count indictment against petitioner charging him with corruptly obstructing a judicial proceeding, in violation of 18 U.S.C. 1512(c)(2) (Supp. IV 2004); forging a judge's signature, in violation of 18 U.S.C. 505; and making a false statement to a federal officer, in violation of 18 U.S.C. 1001(a)(2). The case proceeded to trial.

As part of his defense, petitioner introduced a character witness who testified "that he and others believed [petitioner] to be a person of honesty and integrity." Pet. App. 9a. On cross-examination, the government sought to ask the witness whether his opinion would change based on "an incident in which [petitioner], immediately after learning that his law partner Steven Schapiro had terminal cancer, allegedly changed the beneficiary of Schapiro's life insurance plan from Schapiro's family to the partnership without first notifying [Schapiro] as the partnership agreement required." *Ibid.* After reviewing documents proffered by the government, the district court found that "there's a good faith basis for asking the question." C.A. App. 835. The court permitted the following question: "[I]f I told you

that [petitioner] had changed the beneficiary of an insurance policy away from Mr. Schapiro's family members, designating the law firm the beneficiary in the event of Mr. Schapiro's death, without notice to Mr. Schapiro and in violation of the partnership agreement that the two of them had, would that change your opinion" of "the defendant's honesty or good character?" Pet. App. 9a (first brackets in original); C.A. App. 847-848. The witness responded, "It might." *Id.* at 848.

With respect to the Section 505 forgery count, petitioner requested an instruction requiring the government to prove that forgery was done "willfully and with the intent to defraud another." C.A. App. 15a. The district court denied the request, relying on *United States* v. *Cowan*, 116 F.3d 1360, 1363 (10th Cir. 1997), cert. denied, 522 U.S. 1109 (1998), which held that "[a] forged signature on a document which the forger intends to appear authentic is the only intent requirement of Section 505." C.A. App. 432. The district court then charged the jury that, to find petitioner guilty, they needed to find that he "knowingly and intentionally forged the signature of a judge" and "that the signature was forged for the purpose of authenticating a document." *Id.* at 1431.

The jury returned a verdict of guilty on all counts. Pet. App. 10a. In a post-verdict motion under Federal Rule of Criminal Procedure 29, petitioner argued that "no rational juror could have found that Reich sent the forged Order to the Davidson firm to 'knowingly, intentionally and corruptly obstruct, influence and impede,' the Ryan Beck lawsuit, in violation of 18 U.S.C. § 1512(c)(2)" because there was no evidence that he "intended to deceive the court in sending the forged Order to the Davidson firm." *Id.* at 40a. The court rejected

petitioner's argument, finding that the statute is satisfied where the evidence shows the action was taken with the reasonable expectation that it would interfere with a judicial proceeding. *Id.* at 41a. The court further noted that, even if an intent to deceive a court were required, there was "sufficient evidence for a rational juror to conclude that [petitioner] intended in sending the forged Order to deceive the Second Circuit into believing that the writ of mandamus was moot." *Id.* at 41a & n.3.

3. The court of appeals affirmed. Pet. App. 1a-25a.

The court of appeals held that an "intent to defraud" is not an element of the crime of forging the signature of a federal judge under Section 505. *Id.* at 14a-20a. The court began by recognizing that the "plain language" of Section 505 does not require an intent to defraud, but "only requires that a defendant . . . knowingly forge the signature of a federal judge 'for the purpose of authenticating any proceeding or document.'" *Id.* at 15a (quoting *Cowan*, 116 F.3d at 1362). The court acknowledged that the common-law crime of forgery required an intent to defraud, but it explained that "courts should not assign a common-law meaning to a statutory term 'when that meaning is . . . inconsistent with the statute's purpose.'" *Id.* at 16a (quoting *Taylor* v. *United States*, 495 U.S. 575, 594-595 (1990)). The court further noted that the purpose of Section 505 is to "protect[] the integrity of a government function—namely, federal judicial proceedings," rather than simply to prevent "wronging one in his property rights by dishonest methods or schemes." *Ibid.* (quoting *McNally* v. *United States*, 483 U.S. 350, 358 (1987)). Thus, the court concluded, Section 505 should apply whenever "an individual forges a judge's signature in order to pass off a false document

as an authentic one issued by the courts of the United States," because "such conduct implicates the interests protected by [Section] 505 whether or not the actor intends to deprive another of money or property." *Id.* at 17a.

The court of appeals further held that the district court did not abuse its discretion in allowing cross-examination of petitioner's character witness. Pet. App. 20a-22a. Federal Rule of Evidence 405(a) provides that "[o]n cross-examination" of a character witness, "inquiry is allowable into relevant specific instances of conduct." *Id.* at 20 n.11. Here, because petitioner's character witness stated his personal opinion that petitioner was "a person of honesty and integrity," the court of appeals found that the question about the specific instance of misconduct involving the life insurance policy was pertinent to that opinion. *Id.* at 9a; see *id.* at 21a-22a. The court rejected petitioner's claim that a specific instance of misconduct must be generally known in the community, finding that even if there were such a limitation on "reputation" testimony, it would not apply in this case, where the character witness provided "opinion" testimony. *Ibid.*

Finally, the court of appeals rejected petitioner's argument that "no 'obstruction' occurred within the meaning of [Section] 1512(c)(2) because there was no evidence that 'the fairness or outcome of the Ryan Beck lawsuit was affected in any way.'" Pet. App. 13a (citation omitted). The court held that petitioner's argument was "inconsistent with the plain language of the statute, which encompasses all actions that 'corruptly . . . influence[]' a proceeding—or even attempt to do so—not merely those that affect its ultimate outcome." *Id.* at 14a (brackets in original). The court concluded that the

"injection of the forged Order into the Ryan Beck lawsuit at the very least 'influence[d]' the proceedings" because it caused the opposing party to withdraw its mandamus filing and required the Magistrate Judge to issue an order. *Ibid.* (brackets in original).

ARGUMENT

Petitioner argues (Pet. 14-30) that the district court erred in its interpretation of the statutes under which he was convicted and in its decision to allow cross-examination of a defense witness. The court of appeals carefully considered all of petitioner's claims and correctly rejected them. Although petitioner has identified a conflict among the court of appeals with respect to the elements of the offense of forging a judge's signature under 18 U.S.C. 505, the decisions he cites are decades old. If the courts that have agreed with petitioner were to confront the issue today, they might well reconsider their position in light of more recent decisions from this Court. This Court's intervention is therefore unnecessary at this time. In all other respects, the decision of the court of appeals does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. Petitioner contends (Pet. 14-17) that an intent to defraud is an element of an offense under 18 U.S.C. 505. Petitioner is incorrect. Section 505 makes it a felony to "forge[] the signature of any judge * * * of any court of the United States * * * for the purpose of authenticating any proceeding or document." Nothing in the text of the statute makes intent to defraud an element of the crime. Rather, the only required intent is that the forgery be committed "for the purpose of authenticating any proceeding or document." *Ibid.*

Petitioner argues (Pet. 14) that the word "forges" in Section 505 should be read to require proof of an intent to defraud because the common-law crime of forgery required such proof. Statutory terms do not carry their common-law meaning, however, if a contrary legislative intent can be inferred from the statute. See *United States* v. *Wells*, 519 U.S. 482, 491 (1997); *Moskal* v. *United States*, 498 U.S. 103, 117 (1990). As the court of appeals noted, see Pet. App. 15a, Section 505 already contains an express mens rea requirement, *i.e.*, that a defendant falsely portray the signature of a federal judge "for the purpose of authenticating any proceeding or document." There is therefore no need to read into the statute an additional intent element. Moreover, the purpose of Section 505 is not to "outlaw a narrow category of fraud," but "to protect the reputation and integrity of the federal courts, their official documents and proceedings." *United States* v. *Cowan*, 116 F.3d 1360, 1363 (10th Cir. 1997), cert. denied, 522 U.S. 1109 (1998). Forgery of a federal judge's signature for the purpose of authenticating a document necessarily threatens the integrity of the courts, whether or not the action is accompanied by a fraudulent intent. Pet. App. 19a. Thus, the court of appeals correctly concluded that "engrafting an intent-to-defraud element onto [Section] 505 would not effectuate Congress's intent." *Ibid.*

As the court of appeals noted, see Pet. App. 17a-18a, the larger statutory context in which Section 505 appears provides additional support for the conclusion that Congress did not intend to make an intent to defraud an element of the offense. At the same time that Congress enacted Section 505 as part of its 1948 recodification of the federal criminal code, Act of June 25, 1948, ch. 645, 62 Stat. 714, it explicitly required proof of an "intent to

defraud" in four other provisions involving forgery. See 62 Stat. 705 (18 U.S.C. 471 (forgery of federal obligations)); 62 Stat. 707 (18 U.S.C. 478 (forgery of foreign obligations)); 62 Stat. 708 (18 U.S.C. 482 (forgery of foreign bank notes)); 62 Stat. 712 (18 U.S.C. 500 (forgery of postal service money orders)). The absence of any similar "intent to defraud" language in Section 505 indicates that Congress did not mean to require any additional element of intent when it prohibited a person from "forg[ing]" a federal judge's signature "for the purpose of authenticating any proceeding or document."

The decision of the court of appeals is consistent with decisions of this Court resolving analogous interpretive questions. For example, in *Wells*, this Court held that materiality is not an element of the crime of knowingly making a false statement to a federally insured bank under 18 U.S.C. 1014 (1994). The Court emphasized that the statutory text did not "so much as mention[] materiality." *Wells*, 519 U.S. at 483. The Court found further support for its interpretation in the fact that Congress did include materiality as an element in several false-representation provisions that it enacted at the same time as Section 1014. *Id.* at 492.

Similarly, in *Bates* v. *United States*, 522 U.S. 23, 33 (1997), this Court held that 20 U.S.C. 1097(a), which prohibits the "knowing[] and willful[] * * * misappl[ication]" of federally provided student loan funds, does not require proof that the defendant "aimed to injure or defraud anyone." The Court noted that "[t]he text of [Section] 1097(a) does not include an 'intent to defraud' state of mind requirement, and we ordinarily resist reading words or elements into a statute that do not appear on its face." *Bates*, 522 U.S. at 29. It also explained that Section 1097(d), enacted at the same time as

Section 1097(a), expressly contains an "intent to defraud" element. *Ibid.* "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Id.* at 29-30 (brackets in original).

This Court's decisions in *Wells* and *Bates* support the conclusion that Section 505 does not require proof of an intent to defraud. The express words of Section 505 do not require an additional element of intent, and the fact that Congress expressly required proof of an intent to defraud in other forgery statutes is a strong indication that Congress acted deliberately in not including an "intent to defraud" element in Section 505.

Petitioner argues (Pet. 15-17) that this Court's review is warranted to resolve a conflict among the courts of appeals on whether Section 505 requires proof of an intent to defraud. The Sixth Circuit has concluded that Section 505 should be read to require proof of an intent to defraud. See *United States* v. *Bertrand*, 596 F.2d 150, 151-152 (1979), cert. denied, 450 U.S. 1004 (1981); *Levinson* v. *United States*, 47 F.2d 470, 471 (1931). In dictum, the Eleventh Circuit has expressed a similar view. See *United States* v. *London*, 714 F.2d 1558, 1563-1564 (1983).[1] Those cases, however, were decided long before this Court's decisions in *Wells* and *Bates*. Cf. *Cowan*, 116 F.3d at 1362 (relying on *Wells* in deciding not to read an intent-to-defraud element into Section 505). Until the Sixth and Eleventh Circuits have had an opportunity to reconsider their position in light of *Wells*

[1] In *United States* v. *Dyer*, 546 F.2d 1313, 1316 & n.4 (1976), the Seventh Circuit also suggested that Section 505 requires proof of an intent to defraud but found it unnecessary to decide the issue.

and *Bates*, this Court's review of the issue would be premature.[2]

2. Petitioner argues (Pet. 17-23) that the district court abused its discretion when it allowed the government to cross-examine his character witness about a specific instance of misconduct without providing sufficient procedural protections to ensure that the "incident at issue [was not] purely private." That claim lacks merit, and the court's case-specific determination that the cross-examination was proper does not warrant further review.

Federal Rule of Evidence 405(a) provides that character evidence may be presented in the form of "testimony as to reputation or by testimony in the form of an opinion," and that a witness's character testimony may be rebutted on cross-examination by asking about "relevant specific instances of conduct." Here, during direct examination, petitioner's character witness testified that his "personal experience is [that petitioner has] always been a person of high honesty and integrity, a person that you can trust." C.A. App. 813. He further testified that he thought that "others share that same opinion." *Ibid.* The district court did not abuse its discretion in allowing cross-examination into whether that opinion would change if the witness knew that petitioner had changed the beneficiary of his law partner's life insur-

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[2] In any event, this case is not an appropriate vehicle for considering decide whether Section 505 requires proof of an intent to defraud. Extensive evidence supported a finding that petitioner forged the signature with fraudulent intent. As the district court noted, petitioner forged the order "with the intent to deceive an adverse party" in the context of litigation over a $2 million claim. Pet. App. 41a. Even if the failure to instruct on intent to defraud was erroneous, the error was harmless in this case. Cf. *Neder* v. *United States*, 527 U.S. 1 (1999).

ance policy to his advantage without notice to his partner.

Contrary to petitioner's contention (Pet. 17-21), the decision below does not conflict with the decisions of other circuits concerning the procedures for allowing cross-examination about a specific instance of misconduct. Petitioner contends that other courts have required that the government "demonstrate both a good-faith factual basis for the incidents sought to be raised during cross-examination, and that the incidents inquired about are relevant to the character traits at issue." Pet. 18. But in this case, the court provided precisely those safeguards because it required the government to establish a good-faith basis for the question, which was plainly relevant to petitioner's honesty and integrity. The government offered documentary support for the question, and the judge heard lengthy arguments from counsel out of the hearing of the jury. C.A. App. 817-847.

The decision below also does not conflict with the Eighth Circuit's decision in *United States* v. *Monteleone*, 77 F.3d 1086, 1090 (1996), which held that questions of a reputation witness must relate to conduct of a type "likely to have become a matter of general knowledge, currency or reputation in the community." In *Monteleone*, the character witness provided reputation testimony, so the court held that "the specific acts inquired about" must have been likely to be known by others in the community, or else they "would have no relevance to a defendant's reputation, and, thus, no relevance to the witness's knowledge of that reputation." *United States* v. *Bruguier*, 161 F.3d 1145, 1150 (8th Cir. 1998) (citing *Monteleone*, 77 F.3d at 1090).

The Eighth Circuit has since distinguished the situation in *Monteleone* from the one presented here, where the character witness offers his own personal opinion of the petitioner's character. When "the witness gives her own opinion about a trait of character, as opposed to her opinion about general reputation in the community, * * * [a] specific instance of misconduct, even if not of the kind generally known in the community, would be relevant to the witness's own opinion." *Bruguier*, 161 F.3d at 1150. Therefore, because the character witness in this case testified that his "personal experience is [that petitioner has] always been a person of high honesty and integrity, a person that you can trust," C.A. App. 813, a question about an incident of dishonesty, whether private or public, was appropriate even under the Eighth Circuit's approach. In any event, the government presented evidence that the incident in question *was* widely known in the community. *Id.* at 823-827.[3]

3. Petitioner contends (Pet. 23-27) that a "tendency to affect the merits" of the litigation is an element of an obstruction-of-justice offense under 18 U.S.C. 1512(c)(2) (Supp. IV 2004). That contention lacks merit.

Section 1512(c) makes it a felony to "corruptly * * * obstruct[], influence[], or impede[] any official proceeding, or attempt[] to do so." Petitioner acknowledges that the government presented evidence that he forged an order that purported to grant an injunction and recuse the Magistrate Judge, that the forgery caused opposing counsel to withdraw a pending motion before the United

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[3] To the extent petitioner contends (Pet. 22) that the question violated his Sixth Amendment right of confrontation, he has raised that claim for the first time in the petition for a writ of certiorari, so it is not properly before the Court. See Pet. C.A. Br. 37; *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1, 8 (1993).

States Court of Appeals for the Second Circuit, and that it required the Magistrate Judge to contact the Chief Judge, the United States Attorney, and the court of appeals and to issue an order declaring the forged order void. Pet. 6, 26-27. He contends, however, that he did not "influence" the proceeding because "the bogus order was void and unenforceable, and [therefore] had no impact on the decisions of the Magistrate Judge." Pet. 26. Petitioner cites no authority for his assertion that an action to "influence" a proceeding must be successful in changing the ultimate result of that proceeding. In light of the plain meaning of the word "influence," any effect on the proceedings is sufficient; there is no need to change the ultimate outcome of the litigation. See *Webster's Third New International Dictionary* 1160 (1993) (defining "influence" as "to affect or alter * * * by indirect or intangible means" or "to have an effect on the condition or development of"). Because the jury found that petitioner sent the forged order with intent to influence the proceeding, see C.A. App. 1429-1430, petitioner's conviction was proper.[4]

4. Finally, petitioner argues (Pet. 27-29) that a conviction under 18 U.S.C. 1001 (2000 & Supp. IV 2004) for making a false statement requires that the false statement be contained in a "recording, transcript, or other written document." Because that argument was not raised or passed on below, it is not properly presented here. See *Zobrest* v. *Catalina Foothills Sch. Dist.*, 509

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[4] Petitioner contends (Pet. 23) that deception of the court is required for a completed obstruction offense, but deception of the court is not mentioned in Section 1512(c)(2) and should not be considered an element of the offense. In any event, the district court found that there was sufficient evidence that petitioner deceived the United States Court of Appeals for the Second Circuit. Pet. App. 41a.

U.S. 1, 8 (1993). Petitioner also suggests (Pet. 28-29) that his statement to the FBI was not false because he did not necessarily deny sending the forged order when he said, "I didn't do it." That factbound claim lacks merit and does not warrant further review.[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Attorney

AUGUST 2007

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[5] Petitioner contends (Pet. 29-30) that this Court's decision in *Rita* v. *United States*, 127 S. Ct. 2456 (2007), might address the role of the Confrontation Clause at sentencing. It is unclear precisely what Confrontation Clause issue petitioner wishes to assert. In any event, *Rita* did not address the Confrontation Clause.

(3)

No. 06-1591

IN THE

Supreme Court of the United States

PERRY S. REICH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY TO OPPOSITION

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REPLY TO STATEMENT OF THE CASE

The Solicitor General makes several factual assertions that are refuted by the record and omits several relevant ones. Because neither he nor his staff reviewed the trial transcript, it is understandable and inadvertent. Nonetheless, because these facts are relevant to the issues raised in the Petition and show that, if the issues are resolved in Petitioner's favor the outcome would be impacted, they are set forth below:

1. Neither the District Court nor the Court of Appeals "found" that Petitioner intended to defraud anyone. The statement at p. 12, n.2, of the Memorandum In Opposition ("mem. op.") is incorrect and misleading. The quotation from the District Court opinion is out out-of-context (see Pet. App. 41a.). The District Court stated that, for the purposes of the Obstruction of Justice Count, 18 U.S.C. § 1512(c)(2), the jury could have found an intent to deceive the Second Circuit by making Davidson his unwitting agent. The District Court's "Theory" was not adopted, much less discussed, by the Court of Appeals for the simple reason that the government never invoked that "Theory" before the jury. More important, the District Court eschewed that "Theory" at sentence, specifically stating, "I don't know why Mr. Reich did what he did. I don't know that he knows why he did what he did. This is a tragic case . . ." A. 1624.

2. At the proffer session, Petitioner's attorney was told that, if Petitioner admitted that the incident was a "joke", some sort of non-prosecution agreement might be reached. A. 777-78. Judge Mann's law clerk

(Judge Mann did *not* testify) testified and admitted that he originally told investigators that "it appears that someone was playing a joke." A. 563.

3. The Petition for Mandamus was *never* withdrawn, according to the Second Circuit Docket Sheet, available on Pacer, under *in re Ryan, Beck & Co.*, it was *denied* on the merits.

4. The F.B.I. believed that the bogus document was created on one of Petitioner's computers, either at his home or office, and the hard drives at both locations were cloned, pursuant to a warrant. A. 625-626. No such evidence was found, and some trace of it would have been found had this theory been correct. A. 731-32, 996-999, 1172-74.

5. The Government failed to produce an original fax or a true and complete copy of it. The copies did not differ as to substance. But, that was not at issue. The differences occurred in the "header" area. Some of the "copies" had "extended page 2.1" in the area, one had "extended page 2.2," and several had no such notation at all. The "extended page 2.2" surfaced for the first time a few weeks before trial. A. 629-632. No one testified that he or she made a copy from the original, only that "someone" had made them. A. 156, 168, 211, 285. The differences were central to the defense as the defense expert was of the opinion that the document could not be traced back to a fax. A. 1024-1025.

6. A report by the F.B.I. laboratory corroborated the absence of any nexus between the purported fax and any equipment maintained by Petitioner at his home.

A. 1231-32. The Government did not call this witness, because, as the District Court noted, it undermined the Government's case. A. 1231-32.

7. A search warrant obtained for Petitioner's home and place of business authorized the seizure of a fax machine. There was no dispute that it was not possible to send the subject fax from Petitioner's home computer using its fax modem because the Government's expert explained that the extended page function would only be triggered by a large page size, here two or three pages held together, and Petitioner had a flat-bed scanner. A. 1002. Although a booklet for an ancient machine was found, no fax machine was listed on the return to the search warrant. Yet, the investigating agent testified that he "found" a fax machine in Petitioner's basement, but forgot to take it. A. 621, 625.

8. Petitioner did raise issues of lack of a transcript on recording. A. 664 (Government objection to line of inquiry sustained), and requested a hearing on the good faith basis for cross-examination of the character witness, which was denied. A. 834. Counsel made the confrontation argument namely that there was no way in which the out of court accusation could be challenged through cross-examination. A. 830, 831, 832. And, in permitting the inquiry, the Court said that the question went to the "heart of the Government's case." A. 841.

REPLY TO ARGUMENT

A. *Intent To Defraud Is An Element Of 18 U.S.C. § 505:*

As it must, the Government concedes that there is a conflict between the Circuits, but argues that the minority position is correct, because, at the time that the Federal Criminal Code was re-codified in 1948 four provisions involving forgery contained the words "intent to defraud", while Section 505 did not. It then argues that the failure to use the terms in Section 505 must be construed as a deliberate omission, irrespective of the dictionary definition of the term "forgery".

In doing so, it relies upon *Bates v. United States*, 522 U.S. 23 (1997) and *United States v. Wells*, 519 U.S. 482 (1997). But both cases involved the difference in statutory provisions that were enacted at the *same* time. *Bates*, 522 U.S. at 29; *Wells*, 519 U.S. at 492. No case holds that this rule of construction may be applied to statutory provisions enacted at *different* times. To the contrary, where a stature is simply re-codified or re-enacted, Congress is "presumed to be aware of [a] . . . judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard v. Pous*, 434 U.S. 575, 580 (1978).

Section 505 was originally enacted as a part of the Bankruptcy Act of 1867. *See United States v. Cowan*, 116 F.3d 1360, 1363 (10th Cir. 1997). At that time, there can be no question that forgery was understood to require an intent to defraud. *See Moskal v. United States*, 498 U.S. 103, 121-28 (1999) (Scalia, J., dissenting). *See Gilbert v. United States*, 370 U.S. 650 Cir. 1962). And even today, as

we have noted, the common definition encompasses an intent to defraud.

The Government argues harmless error for the first time in this Court. *See*, Brief and Appendix for the United States in the United States Court of Appeals for the Second Circuit, pp. 33-38. It should not be considered here, for there was good reason for the Government's failure to argue it below. The evidence at trial presented a close case. Indeed, two Government witnesses were forced to concede that initial review suggested a "joke". A. 563, 777-78. And, of course, the District Court confessed at sentence that it "d[id]n't know why Mr. Reich did what he did." A. 1624. There was a serious question on the issue of intent to defraud.

As indicated above, the District Court, did not find that there was no issue with respect to an intent to defraud under 18 U.S.C. § 505. The quotation at p. 12, n. 12, is out of context and with respect to that count; the "Theory" was never argued to the jury and was not mentioned by the Court of Appeals.

Given the contested evidence on intent, recited above, *Neder v. United States*, 527 U.S. 1 (1999), cited by the Government with a "cf." can have no relevance. *Neder* was, moreover, decided by a divided court, and is difficult to square with *Apprendi v. New Jersey*, 530 U.S. 455 (2000) and its progeny.

B. *Cross-Examination Of Character Witness:*

The Government response demonstrates the need for an authoritative construction of F.R. Evid 405.

The traditional justification for allowing "specific act" cross-examination of a character witness is not to prove that the Defendant committed a particular bad act, but rather is permitted to enable the prosecutor to "test the knowledge and credibility of the witness" *Gross v. United States*, 394 F. 2d 216, 220 (8th Cir. 1968). Thus, F.R. Evid. 405 limits the subject of inquiry to "relevant specific instances" of conduct. *See* 2 Weinstein's Federal Evidence § 405.03 (2d ed.); 22 Wright & Graham, Federal Practice and Procedure, § 5268, at 620 (1978).

An act cannot be relevant for cross-examination of a "reputation" witness, unless it is of a type "likely to have become a matter of general knowledge, currency or reputation in the community". *United States v. Duke*, 492 F. 2d 693, 696 (5th Cir. 1974). For an "opinion" witness, the ". . . relevant cross-examination is only that which bears on the fact or factual basis for the formulation of that opinion". *United States v. Curtis*, 644 F. 2d 263, 268 (3rd Cir. 1981). Thus, it must be a matter that the witness would have reason to know about. *See, United States v. Scholl*, 166 F. 3d 964, 974 (9th Cir. 1999) (Cross-examination about public charges of judicial incompetence proper); *United States v. Bruguie*, 161 F. 3d 1145, 1149 (8th Cir. 1998) (Child abuse adjudication is "early verified"; relevant because if the witness knows about it, the basis of her opinion that Defendant was a good father would be undermined, and if she did not know about it, the jury could find that her acquaintance with the Defendant was not thorough enough to justify that opinion).

How can the government seriously contend that the claimed breach of contract—the agreement required written notice, oral notice was given—is "plainly relevant to Petitioner's honesty and integrity?" Mem. Op., pg. 13. It cannot be offered for its truth, despite the Government's implication otherwise. It is only relevant if there were reason for an Appellate Court Clerk to know about it. How could he? The document is not one that he would have access to. And how does giving oral notice instead of written notice—after the matter was discussed with the partner's family members? How is this an act that reflects on character?

Contrary to the Government's argument, there was *no* evidence that this purported breach of contract was known in the community or should otherwise have been known by the witness. After all, the District Court explicitly *denied* a hearing on the issue. A. 834.

Also, though the Government claims to the contrary, the record shows that Defense Counsel repeatedly protested that there was no method to challenge the out of court innuendo, precisely the argument that is made in support of lack of confrontation. A. 830, 831, 832.

No claim is made of harmless error, nor could there be as the District Court said. The inquiry went "to the heart of the Government's case". A. 841. The entire episode was outrageous. The Government was permitted to paint Petitioner as an abhorrent individual who steals money from widows and orphans.

This is reminiscent of asking a witness "When did Defendant stop beating his wife?" It should not be condoned by this Court.

C. *Need For Clear Proof Of What Was Said To Sustain Conviction Under 18 U.S.C. § 1001:*

The Government does not dispute that there is a split in the Circuits concerning the need to show a specific question and a specific answer in order to sustain a conviction under 18 U.S.C. § 1001. Instead, it claims that the issue was not raised below. The Government is incorrect.

Petitioner made specific Motions to Dismiss the count, because the indictment charges that he affirmatively stated that he did not fax the Order, but the only testimony at trial was that Petitioner never *volunteered* that he did so. A. 770, 778. Moreover, inquiry into whether a recording or transcript was made, or should have been made, was precluded by the Trial Court on the Government's objection. A. 664.

Respectfully submitted,

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